

No. 819.

United States Circuit Court of Appeals

SIXTH CIRCUIT.

GEORGE BLEISTEIN, AND OTHERS, DOING BUSINESS UNDER THE NAME OF THE COURIER COMPANY AND THE COURIER LITHOGRAPHING COMPANY, *Plaintiffs in Error,*

vs.

THE DONALDSON LITHOGRAPHING COMPANY, *Defendant in Error.*

Copyrights.

BRIEF FOR PLAINTIFFS IN ERROR.

Writ of Error to United States Circuit Court, District of Kentucky.

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UNITED STATES CIRCUIT COURT OF APPEALS

SIXTH CIRCUIT.

GEORGE BLEISTEIN, JOHN W. BRIDG-
MAN, JOHN A. RUDOLF, ANSLEY
WILCOX, GERRIT B. LANSING AND
EDWIN FLEMING, DOING BUSINESS
UNDER THE NAME OF THE COURIER
COMPANY, AND THE COURIER LITHO-
GRAPHING COMPANY,

Plaintiffs in Error,

AGAINST

THE DONALDSON LITHOGRAPHING
COMPANY,

Defendant in Error.

No. 819.

STATEMENT—RULE-24.

This action comes before this court upon writ of error to the United States Circuit Court for the District of Kentucky.

The action was begun on the tenth day of June, 1899, by the filing of the declaration or petition, and the seizure under process by the marshal of 10,590 copies of eight page prints, 13,205 copies of four page prints, and five metal electrotype plates, found in the possession of the defendant. (Printed Record, pages 2 and 13.)

The petition sets up three separate causes of action, all based on § 4965 of the Revised Statutes of the United States, and alleges that the defendant has violated the plaintiffs' copyrights in three different lithographs, which would be more accurately described as *chromo-lithographs*, copyrighted under the following titles:

1. "Spectacular Ballet Design."
2. "Stirk Family Design."
3. "Statuary Act Design."

(Printed Record, page 2.)

The action was tried at Covington, Ky., December 12 and 13, 1899, before Hon. Walter Evans, sitting as Circuit Judge, and a jury. At the close of the plaintiffs' case, the defendant moved for a nonsuit, or peremptory direction of a verdict as it is called under the Kentucky practice, which motion was granted; the court delivering a written opinion setting forth its reasons therefor (Printed Record, pages 60-66).

There is no question presented by the record as to the fact of infringement. The pirate sheets in evidence contain small reproductions, by means of cheap electrotype plates, of each of the plaintiff's designs. These reproductions are not in colors.

The following questions are presented for the determination of this court:

1. Are the lithographs in suit, or any of them, the proper subjects of copyright under the laws of the United States?

2. Was the "Statuary Act Design," published prior to the completion of the copyright, and does the evidence present any question as to the completion of the three copyrights, or any of them, prior to the publication thereof which might be submitted to the jury?

3. Had the plaintiffs the right to take out copyrights in either of their well-established copartnership or association names?

4. Had the plaintiffs the right to take out copyrights, as proprietors, upon lithographs made by an employee?

5. Did the court err in rejecting the evidence, specified in the Assignment of Errors (Printed Record, page 19), or any of it, as offered by the plaintiffs?

6. What is the amount that the plaintiffs are entitled to recover, if entitled to recover anything in the case?

Exceptions were taken at the trial to the rejection of evidence and to the granting of the nonsuit. A motion for a new trial was made and overruled. The printed record contains all of the evidence and exceptions; also the motion for a new trial, and the order overruling it and the opinion of the court. Upon this record the foregoing questions are raised.

POINT I.

The lithographs in suit are the proper subjects of copy-right under the laws of the United States.

The lithographs are more properly described as *chromos*, or *chromo-lithographs*, each of them being "a picture printed in tints and colors." The word *chromo*, according to Webster's International Dictionary, is an abbreviation of *chromo-lithograph* and the latter word is defined as "*a picture printed in tints and colors by repeated impressions from a series of stones prepared by the lithographic process.*" It is claimed that they are entitled to protection under the copyright laws both as *chromos*, and as included in the more general terms, *prints*, *cuts*, and *engravings*.

The "Spectacular Ballet Design" represents the chorus of the ballet in grand opera, with three principals in the center. The "Stirk Family Design" represents a family of expert bicycle riders engaged in fancy riding. The "Statuary Act Design" exhibits a number of tableaux, of historical and classic events—"Landing of Columbus," "Apollo and the Muses," "Triumph of Love," "Rock of Ages," and "Offering to Cupid."

These lithographs were made for the purpose of sale, and were designed after B. E. Wallace, proprietor of the Wallace Shows, had agreed to purchase a specified quantity of them. The court below held, probably because of this agreement, that the designs were intended only for the reproduction of cheap show bills, and were not within the acts of congress authorizing copyrights. Of course this question must be determined before the other questions in the case become material; we shall examine, therefore, in detail the constitution and statutes of the United States for the purpose of determining whether or not the plaintiffs' copyrights are of any force and effect.

"The Congress shall have power: * * * To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

U. S. Const., Art. 1, § 8.

The word "authors" in the constitution is not confined to literary writers, but includes, among others, engravers, designers and lithographers.

Burrow-Giles Litho. Co. vs. Sarony, 111 U. S. 53;
28 L. Ed. 349.

The power vested in congress is to "promote the progress of science and *useful arts*." The constitution does not specify "fine arts" nor "mechanic arts" nor "industrial arts," but includes in its scope all arts which may be "useful."

Any art, therefore, which contributes to the industry, needs, edification, or happiness of mankind, is within the legislative power of congress.

The power thus granted is not confined to the arts "in use when the constitution was adopted, but it keeps pace with the progress of the country and adapts itself to the new developments of time and circumstances."

See *Pensacola Tel. Co. vs. West. Union Tel. Co.*, 96 U. S. 1; 24 L. Ed. 708.

The constitution vests congress with plenary power and leaves entirely to its discretion the determination of what authors and inventors shall be protected and the means — by patent, copyright or otherwise — by which their "exclusive" rights shall be secured. In the exercise of this discretion, the wisdom, purpose, or motives of congress are not open to review, except in the forum of public opinion.

Chae Chan Ping vs. United States, 130 U. S. 581; 32 L. Ed. 1068.

To ascertain, therefore, whether the lithographs in suit are protected, we have only to determine whether or not congress, in its discretion, has included them among the subjects of copyright. In view of the manner in which the court below discussed the statutes, on which the plaintiffs base their claim, it seems to be necessary to review somewhat in detail the various legislation upon the subject.

Act of May 31, 1790 :

"An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned."

"* * * And that the author and authors of any map, chart, book or books already made and composed, and not printed or published, or that shall hereafter be made and composed, being a citizen or citizens of these United States, or a resident therein, and his or their executors, administrators or assigns, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books for the like term of fourteen years from the time of recording the title thereof in the clerk's office as aforesaid * * *."

1 *Statutes at Large*, 124.

Note that this act is limited in its purpose to "the encouragement of learning"; and that the word "proprietor" appears in the title but that only the word "assigns" appears in the statute. This would limit the right of copyright to authors although the protection of the copyright once granted would extend to the assigns of the author.

Supplementary Act of April 29, 1802:

"Sec. 2. *And be it further enacted*, That from and after the first day of January next, every person, being a citizen of the United States, or resident within the same, who shall invent and design, engrave, etch or work, or from his own works and inventions, shall cause to be designed and engraved, etched or worked, any *historical or other print* or prints, shall have the sole right and liberty of printing, reprinting, publishing and vending such print or prints, for the term of fourteen years from the recording of the title thereof in the clerk's office, as prescribed by law for maps, charts, book or books: * *."

2 *Statutes at Large*, 171.

Note that this act extends protection by copyright to historical or other prints. It was probably inspired by developments in the art of engraving and pictorial representations, both in steel and wood-cuts. Its benefits, however, are not limited to works which might be classed as of the "fine arts."

Act of February 3, 1831:

"An Act to amend the several Acts respecting copyrights."

"* * * That from and after the passage of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any *book or books, map, chart, or musical composition*, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, or who shall invent, design, etch, engrave, work, or cause to be engraved, etched or worked *from his own design*, any *print or engraving*, and the executors, administrators, or legal assigns of such person or persons, shall have the sole right and liberty of printing, reprinting, publishing, and vending such book or books, map, chart, musical composition, print, cut or engraving, in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed."

4 *Statutes at Large*, 436.

Note that this is the first act to use the word "copyright;" that it extends the benefit of copyright to "musical compositions" and omits the word "historical" as qualifying the word prints; but that its benefits may be enjoyed so far as the various prints are concerned, only by one who himself does the work, or from his own design causes the work to be done. This shows the legislative intention to extend the protection of copyright to the various prints that were then coming into use. It does not provide for a copyright by the proprietor, although it preserves the benefit of a copyright, once secured, to the assigns of the author.

Act of August 18, 1856 :

"That any copyright hereafter granted under the laws of the United States to the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs or assigns, along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained; * * *."

11 *Statutes at Large*, 138.

Supplementary Act of March 3, 1865 :

"That the provisions of said act [Act of February 3, 1831, and Supplemental Acts] shall extend to and include *photographs and the negatives thereof* which shall hereafter be made, and shall inure to the benefit of the authors of the same in the same manner, and to the same extent, and upon the same conditions as to the authors of prints and engravings. * * *."

"That in the construction of this act the word 'book' shall be construed to mean every volume and parts of a volume, *together with all maps, prints, or other engravings belonging thereto*; * * *."

13 *Statutes at Large*, 540.

Note that this act simply extends the same protection, by copyright, to photographers that is enjoyed by the authors of "prints" and "engravings" and upon the same terms and conditions.

By the time this act was passed photography had arisen to the rank of a "useful art"; and the photographer was recognized as being entitled to protection, in that which was the result of his own intellectual conception and taste the same as the engraver.

Act of July 8, 1870 :

“An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights.”

“Sec. 86. *And be it further enacted*, That any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or *proprietor* of any *book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof*, or of a *painting, drawing, CHROMO, statue, statuary*, and of *models or designs intended to be perfected as works of the fine arts*, and his executors, administrators, or assigns, shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others; and authors may reserve the right to dramatize or to translate their own works.

16 *Statutes at Large*, 198, 212.

Note that this act extends protection, by copyright, to paintings, drawings, *chromos*, statues, statuary, and to models and designs intended to be perfected as works of the fine arts—the first use of the word “fine arts” in the copyright statutes of the United States.

Note also that this statute provides that the “proprietors” of any of the enumerated articles may secure a copyright. This was necessary to accomplish the purposes of the statute under modern conditions—large capital being required in scientific and literary enterprises as well as in the other arts sought to be promoted—which, to a large extent, exclude both the scholar and the artist, as well as the artisan, from owning the fruits of their own genius.

The foregoing are the copyright acts prior to the enactment (June 22, 1874) of the Revised Statutes of the United States. Their provisions were substantially re-enacted in § 4952 of the Revised Statutes which, as amended by the International Copyright Law of March 3, 1891, is as follows:

“Sec. 4952. The author, inventor, designer, or *proprietor* of any *book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof*, or of a *painting, drawing, CHROMO, statue, statuary*, and of *models or designs intended to be perfected as works of the fine arts*, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, exe-

cutting, finishing, and vending the same; and, in the case of dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others. And authors or their assigns shall have exclusive right to dramatize or translate any of their works, for which copyright shall have been obtained under the laws of the United States."

Act of June 18, 1874.

"An Act to amend the law relating to patents, trademarks, and copyrights."

The first section of this act prescribes the form of notice to be printed on copyrighted articles and is printed by the Librarian of Congress in place of § 4962 of the Revised Statutes. The second section relates to the fees of the Librarian and is printed by him as if a part of § 4958 of the Revised Statutes.

"Sec. 3. That in the construction of this act, the words 'engraving', 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other article of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label, not a trade-mark, six dollars, which shall cover the expense of furnishing a copy of the record, under the seal of the Commissioner of Patents, to the party entering the same."

18 *Statutes at Large*, 78.

This act is not made a part of § 4952 of the Revised Statutes as the court below seems to have thought. It might be argued that the words "this act" in the above are confined in their application to the amendatory act itself, but we are not compelled in this action to limit its application.

It is submitted, however, that this act, so largely considered by the court below, has no application to the case at bar; because the articles in suit are colored lithographs, or chromos. A chromo being "a picture printed in tints and colors" (Webster's Inter. Dict.), an act merely restricting the meaning of the words "print," "cut," or "engraving," as used in the copyright statute, to "pictorial illustrations," etc., would have no occasion to mention chromos, which were protected by the same statute, but would leave them the subjects of copyright as therein provided.

But since this amendatory act was a stumbling block in the path of the court below and may have led to some illy-considered *obiter dicta* in other cases, let us examine into the circumstances attending its enactment that we may obtain a thorough understanding of its purpose and application.

Under the act of July 8, 1870, and under the Revised Statutes there was no limitation placed upon what might be included in the term "print." The growth in the art of printing by means of stereotype, and other plates, entitled almost anything which possessed originality and usefulness to be copyrighted as a "print." The result was that the Librarian of Congress was embarrassed to know how to classify and where to deposit labels which were copyrighted as prints, cuts or engravings. A specimen of these may be found in the case of *Scoville vs. Toland*, (Fed. Cases No. 12553.)

"Doctor Rodgers' Compound Syrup of Liverwort and Tar. A safe and certain cure for consumption of the lungs, spitting of blood, coughs, colds, asthma, pain in the side, bronchitis, whooping-cough, and all pulmonary affections. The genuine is signed Andrew Rodgers."

The librarian sought relief from Congress, and we find the reasons for the enactment of this provision set forth in the report of the committee made to the Senate.

"Mr. Wadleigh (N. H.) from the Senate Committee on Patents reported a bill (Senate Bill 876) and explained briefly its purpose and that it had been prepared by the committee at the request of the Librarian of Congress.

"The third section provides that labels of this kind which I show to the Senate [exhibiting a label] printed by printers and sold to the trade, which are not trade-marks, shall be sent to the Patent Office and there recorded instead of being sent to the Library of Congress, they having nothing to do with works of art, and having no place for them in the Library of Congress."

Cong. Record, 43rd Congress, 1st Session, Vol. 2, Pt. 5, Page 4413, June 1, 1874.

In the House of Representatives the bill was passed substantially without comment except that it was stated that it had been agreed upon by the joint Committee of the Library.

Same Vol., Page 4875.

It is to be noted that this amendatory provision (assuming that it relates to the act amended) does not provide what may be copyrighted, but its purpose and its provisions simply divide the subjects of copyright as prints, cuts, or engravings, into two classes: one including both "pictorial illustrations" and

"works connected with the fine arts," which are to be deposited in the Library of Congress; and the other including labels which are to be registered in the Patent Office.

This is perfectly clear when it is noted that congress has used the words "*models or designs intended to be perfected as works of the fine arts*," as indicating a distinct and separate subject of copyright in §4952, and substantially twice in §4956, once in §4962, and twice in §4965 of the Revised Statutes. An examination of the copyright statutes leads irresistibly to this conclusion.

The theory advanced by the court below that congress intended to use the words "pictorial illustrations" as referring to "representations placed in a book or other publication to illustrate the text" is untenable. Aside from numerous decisions holding that the copyright of a book includes the illustrations within its protection, (7 *Amer. & Eng. Ency. of Law*, 2d ed., 561) the act of March 3, 1865 (13 *St. at L.*, 540), had so decreed. How then can it be supposed that congress intended simply to provide for the unheard-of practice of securing separate copyrights upon the illustrations of a book?

The act does not even take labels, that are entitled to protection, out of the realm of copyrights. Although they must be registered in the Patent Office, they are, nevertheless, protected in the same manner as other copyrights, and not as patents.

Marsh vs. Warren, *Fed. Cases*, No. 9121.

Higgins vs. Keuffel, 30 *Fed. Rep.* 627.

Higgins vs. Keuffel, 140 *U. S.* 428; 35 *L. Ed.* 470.

To assume that congress intended to limit the subjects of copyright to "pictorial illustrations connected with the fine arts," as argued by the court below, reverses the history of the statute and practically abrogates its provisions, as well as distorts its language. "Engravings" and "prints" were the subjects of the amendatory act of April 29, 1802, and have been continued in the statutes ever since. The act of July 8, 1870, used the words "engraving, cut, print; or photograph or negative thereof"; also "painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts." This was the first provision for the copyright of works of the fine arts in the United States. "Prints" and "engravings" had been the subjects of copyright for nearly three-quarters of a century.

Lithographs are not mentioned under that name in §4952 of the Revised Statutes, but are included in the more general terms "print," "cut" and "engraving"; and "chromos," or colored lithographs, are expressly mentioned, the same as in the prior enactments. They are specifically and repeatedly men-

tioned in §4956 and §4963 of said statutes, always in connection with the word chromo. §4956, quoted in full in the opinion of the court below, prescribes the method of procuring a copyright, and §4963 relates to false claims of copyright.

The adaptability of lithography to business use, and the brand of commercialism which it early received, had raised a question as to whether most lithographs ought to be classed with the "fine arts" before those words, or the subjects thereof, were incorporated in the copyright statutes (see 70 *Fortnightly Review*, 968, Dec. 1898).

It cannot be disputed, however, that lithography is a "useful art." Congress, in its discretion, has provided for its promotion by authorizing copyrights upon "chromos," and such other "prints," cuts and engravings" as are "pictorial illustrations." It has even specified "lithographs" in the recent re-enactment of the statutes as above mentioned.

We come now to a consideration of what is the subject of copyright. Here we find a mass of decisions, many of which, at first sight and on a cursory examination, seem to be out of harmony, if not in open conflict, with one another, but upon a more careful collation and examination, we believe that the lack of harmony is only apparent and not real. For convenience, we shall divide our collation of the cases upon this question under four headings, viz.: (1) labels, (2) systems or devices, (3) advertisements, (4) meritorious articles.

(1) *Labels*.—It is established that mere labels—those which are not complete in themselves and have no use or value apart from some article to which they may be attached, or consist merely of descriptive terms—are not the subject of copyright.

Scoville vs. Toland, Fed. Cases, No. 12553.

Marsh vs. Warren, Fed. Cases, No. 9121.

Higgins vs. Keuffel, 140 U.S. 428; 35 L. Ed. 470.

But these cases are careful not to lay down the broad rule that labels which admit of intellectual or artistic treatment, and are sufficiently complete to be useful and valuable in themselves, are not the subjects of copyright.

See *Schumacher vs. Schwencke*, 25 Fed. Rep. 466.

(2) *System or Device*.—Since the theory of copyrights is simply protection of the right of reproduction, a system or device, although it may be protected by patent, cannot be protected by a copyright. As said by the court in the case of *Kenrick & Co. vs. Lawrence & Co.* (Law Rep. 25 Q. B. Div. 99):

"It seems to me therefore that although every drawing of whatever kind may be entitled to registration, the degree and kind of protection given must vary greatly with the character of the drawing, and that with such a drawing as we are dealing with, the copyright must be confined to that which is special to the individual drawing over and above the idea."

A "Cosmopolitan Sleeve Chart," no claim being made for the description of the way to measure for sleeves, is not the subject of copyright. It was merely a mechanical contrivance, appliance or tool, to be used in the cutting out of sleeves for ladies' dresses.

Hollinrake vs. Truswell, L. Rep. 1894, 3 Ch. Div. 420.

But a single sheet containing diagrams and also directions and instructions for taking measures and cutting ladies' dresses, is copyrightable as a book.

Drury vs. Ewing, Fed. Cases, No. 4095.

Pattern Prints of Balloons, which are really a device constituting an article of merchandise to be sold and used, are not the subject of copyright.

Rosenbach vs. Dryfuss, 2 Fed. Rep. 217.

An advertising card, containing thirty bits of paper of various colors, illustrating paints, the only complaint being of a plagiarism of the system of advertising and not of the copying of the complainant's particular designs, is not protected by copyright.

Ehret vs. Pierce, 10 Fed. 553.

A letter file, constituting a device simply for filing letters, is not the subject of copyright.

Amberg File and Index Co. vs. Shea, Smith & Co.,
78 Fed. Rep. 479; *aff'd* 82 Fed. Rep. 314.

A system of bookkeeping cannot be protected by copyright; although a book expounding that system might be copyrighted, the system itself, being an art, can be protected only by patent.

Baker vs. Selden, 101 U. S. 99; 25 L. Ed. 841.

A spectacular exhibition, telling no story, having no literary character, simply seeking to please by a system of costuming and graceful posing, is not the subject of copyright. The court held that the "Black Crook" was of this description. Although the application of the principle to this entertainment has been criticised, the law itself is well established.

Martinetti vs. Maguire, Fed. Cases, No. 9173.

A serpentine dance is not the subject of copyright as a dramatic composition; the court saying that an article in order to be copyrighted might be simple, "but it must repeat or mimic some action, speech, emotion, passion or character, real or imaginary. And when it does it is the ideas *thus expressed* which become the subject of copyright."

Fuller vs. Bemis, 50 *Fed. Rep.* 926.

In the last two cases the things sought to be protected were the spectacular exhibition and the serpentine dance itself. They were not copyrights of a picture or illustration of the exhibition or of the dance.

(3) *Advertisements*.—The question whether advertisements are the proper subjects of copyright has been frequently before the courts both in this country and in other jurisdictions. In an early case in England, the plaintiff, a cemetery stone-mason, employed and remunerated a person to collect monumental designs, and published a book containing sketches of such designs, with scarcely any letter-press. It was designed for use as an advertisement to show to customers, let them select, and to be able to give a price on their selection. In the course of its opinion; upon the question of whether an advertisement comes within the provisions of the Copyright Act, the court says:

"The contention has been that it does not, because the book is not capable of being described as one of lasting benefit to the world; but it appears to me that I cannot do otherwise than to hold that this is a work which comes within the description mentioned in the Act. It is true that this work has little letter-press; but it is full of interesting matter, which I have no doubt is very often referred to and consulted as well by persons who contemplate their own deaths as by others in reference to those who have died. Next, it was contended, that the plaintiff is not entitled to a decree because he has not brought himself within the section of the Act which refers to authors and their assignees; but I think the words of the section are wide enough to embrace the case of a person employing another person and remunerating that person for the work done. The person remunerated has no claim to the copyright, but it is the property of the person who remunerates him, and in this court the person who remunerates must be taken to be the *equitable assignee*, and the publisher within the meaning of the Act. It was also contended that this work is not entitled to any protection having regard to its character—that it is, in fact, a mere advertisement, and that an advertisement is not, on the

authority of *Corbett vs. Woodward* [L. R. 14 Eq. 407] entitled to protection. The decision in that case turned entirely on the circumstances which existed in it—it was a catalogue of articles which were being offered for sale. But it does not appear that the case of *Hotten vs. Arthur* [1 H. & M. 603] was mentioned to the Master of the Rolls, and whether, if it had been his Lordship's decision, would have been different it is difficult to say, but certain it was decided in *Hotten vs. Arthur* that a catalogue may, under certain circumstances, be protected by injunction. In this case the plaintiff has been right from the beginning and the defendant has been wrong. The plaintiff was in my opinion right in filing this bill, and the defendant was wrong in resisting it, therefore there must be an injunction as asked for, and the defendant must pay the costs of the suit."

Grace vs. Newman, Law Rep. 19 Eq. Cases, 623.

The case of *Hotten vs. Arthur*, referred to in the foregoing opinion, was the case of a catalogue of books and was not like the case of *Corbett vs. Woodward* (L. Rep. 14 Eq. 407) a mere list of articles. It contained not only a list of books and their prices, but also a description of them, and historical notes upon them so that it admitted of intellectual treatment and was sufficiently complete in itself to be useful and of value. This explanation dispells the conflict between the two cases.

In a more recent case in England where a catalogue was of sufficient value to be plagiarized, in the course of its opinion the court says:

"The weight of authority then is against the doctrine that there cannot be copyright in a book used as advertisement, and I can not see any principle in support of that doctrine. * * * The defendants thought that the law allowed them to appropriate the results of other men's labours, and they call upon us for an indulgent construction of the Act in their favour. It is in my opinion the duty of the court to construe Acts of Parliament with a view to the furtherance of justice."

Maple & Co. vs. Junior Army & Navy Stores, Law Rep. 21, Ch. Div. 369 (1882.)

The Canadian copyright statutes are modeled upon those of the United States, and in a recent decision there, in an action to enjoin the use of advertisements of a school for the cure of stammering, the court says:

"The purely commercial or business character of the composition or compilation does not oust the right to protection if time, labour and experience have been devoted

to its production. That this is so in the present case, the plaintiff testifies, and that the papers must be of some merit and utility would seem to be proved by the defendant's willingness to abstract or convey various passages in them so as to form parts of his rival advertisements."

Church vs. Linton, 25 Ont. Rep. 131.

Where one has the right to manufacture an article—e. g. a billiard table—he also has the right to have an engraving of that table made and to circulate it as an advertisement. A copyright on an engraving of a like table, previously manufactured, will not prevent it. Furthermore, the copyrighted engraving in this case was of no use apart from the table it represented.

Collender vs. Griffith, Fed. Cases, No. 3000.

Substantially the same doctrine was held as to an illustrated catalogue of school furniture, etc.—the court expressly declining to pass upon the question, on a preliminary motion for an injunction, whether or not the catalogue was of such a character as to be the subject of copyright as an article admitting of intellectual or artistic treatment, and sufficiently complete to be useful in itself.

Lamb vs. Grand Rapids School Furniture Co. 39 Fed. Rep. 474.

A mere price catalogue, admitting of no intellectual or artistic treatment, and having no value apart from the articles described in it—merely detached labels—is not the subject of copyright.

J. L. Mott Iron Works vs. Clow, 82 Fed. Rep. 316.

A work of artistic merit, however, such as a chromo designed as a symbolic glorification of lager beer drinking, is a proper subject of copyright, though designed and used for gratuitous distribution as an advertisement for the purpose of attracting business.

Yuengling vs. Schile, 12 Fed. Rep. 97.

(4) *Meritorious articles*.—There is much *orbiter dicta* scattered through the cases to the effect that to be the subject of copyright an article must exhibit in some degree "the fruits of intellectual labor, embodied in the form of books, prints, engravings and the like." We have no occasion to quarrel with this rule in this case; but owing to the fact that the courts disclaim the right to act as literary or artistic critics, and that there is no difference in principle between determining that there is some literary merit and in determining the degree of it, we submit that a careful collation of the decisions will

demonstrate that the courts go no farther than to hold that the article must be of such a character as to admit of intellectual or artistic treatment, and be sufficiently complete to be useful in itself.

The case of *Clayton vs. Stone* (Fed. Cases, No. 2872), was decided in 1829, under the first act, which was entitled "for the encouragement of learning," and held that a price current, showing the state of the market from day to day or week to week was not the subject of copyright. The provisions of the copyright law at that time required the deposit of title, the recording of the same, the publication of the record for four weeks within two months thereafter, and the deposit of the book within six months thereafter. These requirements practically precluded the copyright of newspapers. There is contained in the opinion an argument that the gathering of such statistics is a work of mere industry, not admitting of artistic or intellectual effort. This argument has been sometimes quoted, without noting that the case was decided under the act "for the encouragement of learning," and that the only question decided was that the copyright statute could not have intended to include newspapers in the term "books."

The case of *Taylor vs. Gilman* (24 Fed. Rep. 632), decides nothing upon the question of merit, but merely holds that tabulated sheets of information are not a "chart;" that they may be a book, but since the provisions of the statute are not the same, an erroneous copyright will not support a recovery.

In *Brightly vs. Littleton* (37 Fed. Rep. 103), it was held that legal forms are copyrightable, the court saying:

"The matter must be original and possess some possible utility. The originality, however, may be of the lowest order and the utility barely perceptible."

But in the case of *Carlisle vs. Colusa County* (57 Fed. Rep. 979), it was held that legal forms were the subject of copyright only when made from common property; that is to say, where the person securing a copyright on them was not entitled to get up his forms at all he would not be protected thereby. In the course of its opinion the court says:

"The degree of merit of the copyrighted matter the law is not concerned with. Any is legally enough. To use it or not use it is voluntary on the part of the public."

In *Shook vs. Rankin* (Fed. Cases, No. 12804), it was held that the mere translator of a play, by consent of the author, may take out a copyright in his own name.

In *Emerson vs. Davies* (Fed. Cases, No. 4436), it was held that an original plan or compilation of materials, though the materials are gathered from sources open to all, such as the mathematical principles contained in an arithmetic, entitles one to a copyright.

In *Dawry vs. Ewing* (Fed. Cases, No. 4095), the court says:

"It is clearly no objection to the validity of her copyright, that her production does not claim a standing as a work of great literary merit; the statute does not make this a necessary element of a legal copyright, and it is well known that there are works of great practical utility, having no pretensions to literary merit which are yet within, not only the words, but the scope and design of the statute."

In *Richardson vs. Miller* (Fed. Cases No. 11791), the court held that a design for playing cards was the subject of copyright and was not immoral so as to vitiate the protection thereof. In the course of the opinion, the court says:

"In some prints the novelty of the design may consist in the form, outlines or grouping. In others, in the use, combination, arrangement or harmony of colors. In others, in the combination of some or all of these attributes. It is also claimed that the copyright is invalidated for the reason that his prints are not the fit subject of a copyright. Courts of justice will not lend their aid to protect the authors of immoral works, but where there is nothing immoral or improper in the prints themselves, the fact that they may be used by persons to violate the laws against gambling, does not of itself deprive them of the protection of the law. *To do this, it must appear either that there is something immoral, pernicious or indecent in the things per se, or that they are incapable of any use except in connection with some illegal and immoral act.* It is not contended that the playing cards of the complainant are subject to either of these imputations."

In *Yuengling vs. Schile* (12 Fed. Rep. 97), the court lays down the doctrine that anything in the shape of an engraving which is a "work of the imagination" and has obvious "artistic qualities" is fairly a subject of copyright.

In *Hanson vs. Jaccard Jewelry Co.* (32 Fed. Rep. 202), it was held that a compilation requiring labor, care and some skill in preparation is the subject of copyright.

In *Henderson vs. Tompkins* (60 Fed. Rep. 758), it was held that a "topical song," part of a dramatic composition, designed

merely to amuse and possessing little literary merit or originality is nevertheless the subject of copyright, the court saying, among other things:

"It is enough to say that whether we look only at the direct results of what is addressed to the taste, the imagination, or the capacity of being amused, and the enjoyment which immediately follows therefrom, or whether we look further, and consider what is essential to keep the physical, moral, and intellectual powers refreshed, all such have been regarded by the courts, ever since patents or copyrights were authorized by statute, as within the range of utility and the useful arts. Even when the intellect is strained to accomplish its greatest results, the standard prescription from Euclid may be useful, but an occasional one from the Book of Nonsense is not to be despised. * * *

"If judicial tribunals could lay down maxims by which to determine judicially what dramatic compositions claimed to be humorous, or to appeal to the sense of humor, are in this particular within or without the copyright act, they would, by demonstration, be in possession of rules which would enable them to be themselves at all times witty, at their own option. The very essence of some kinds of humor is in unexpectedness and lack of proportion; and, therefore, neither courts nor juries have any certain rule for valuing it, except such as comes from evidence of the effect which the composition in question has on masses of men. The claim made by the defendant that the 'box-office value' fails to furnish any test under the copyright laws of the United States, with reference to dramatic compositions, is not sustainable. * * *

"But a multitude of books rest safely under copyright which show only ordinary skill and diligence in their preparation. Compilations are noticeable examples of this fact. With reference to this subject, the courts have not undertaken to assume the functions of critics, or to measure carefully the degree of originality, or literary skill or training involved. An example of the moderate degree of literary merit sufficient to entitle a dramatic composition to protection under the statutes, is found in *Daly vs. Palmer*, 6 *Blatchf.* 256 (Fed. Cas. No. 3552) and again in *Daly vs. Webster* (decided by the Court of Appeals for the Second Circuit), 4 C. C. A. 10, 56 Fed. 483, each touching the 'railroad scene' so called. There is also the case, not officially reported, of the comic song, entitled, 'Slap, Bang, Here We Are Again!' protected by the common

pleas division, although the impression which the title gives would suggest little value, except what might be shown by sales. It appeared in this case that the copyright was worth from one thousand pounds to two thousand pounds, and at the time of the trial as many as 90,000 copies had been sold. * * *

"Under the copyright side of the statute, however, especially so far as it relates to dramatic compositions, what appeals to the sense of curiosity, or excites wonder, is especially valuable, and therefore must be protected, or the purpose of the statute would fail in a very large measure. On the whole, the authorities sustain the implication arising from Mr. Drone's statement of the converse rule, as follows:

"To be worthy a copyright, a thing must have some value as a composition, sufficiently material to lift it above utter insignificance and worthlessness." * * *

"If it has merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection."

We submit that these cases show a consistent current of decision, in this and other jurisdictions, and establish the law that any article, of the classes enumerated in the copyright statute, and especially a colored print or chromo, which is of such a character as to admit of intellectual or artistic treatment and sufficiently complete to be useful in itself, is fairly within the intent of the law and the subject of copyright.

Having determined what we believe to be the proper criterion, let us now examine as briefly as possible the lithographs or chromos in suit and see if they bear the test.

They are at once "chromos," "pictorial illustrations," "prints," "cuts," and "engravings." One represents a chorus of ballet dancers; another a family of athletes engaged in an exhibition of fancy bicycle riding; and the other several tableaux of historic and classic events. That these are all subjects of intellectual and artistic treatment can not be denied. Each chromo or lithograph is complete in itself, and valuable — else the defendant would not have pirated it.

The court below characterizes them as "designed for use of show bills and as advertisements for the Wallace Circus;" as "neither 'pictorial illustrations' nor 'works connected with the fine arts' within the meaning of the law;" as "designed to lure men to a circus;" and as not being "either useful art or fine art," but to be "regarded as merely frivolous," and not within the intent of the statute. (Printed Record, pages 61, 63, 64.) Let us examine this view of the matter.

It is true that they were gotten up after Mr. Wallace had agreed to purchase a specified quantity of them—of various sizes—and that Mr. Wallace furnished his own picture and the letter-press that accompanies them. But it is the *designs* upon which the plaintiffs claim a copyright—that which is original with them. The defendant proved by Mr. Bleistein, on cross-examination, that it was the custom of the trade when a customer agreed to purchase a particular quantity of special matter not to sell to anyone else so long as the customer continued to buy of the designers. On re-examination the witness was allowed to state that they did sell such matter to other parties after the customer ceased to purchase it, but the court declined to allow proof of the custom of the trade in that regard—of which more under another heading. (Printed Record, 1 ages 31, 32, 33.)

It is submitted that this *does not establish* that the plaintiffs designed the lithographs *exclusively* for use as circus bills. They designed them for sale to Mr. Wallace so long as he desired to buy, according to the custom of the trade, and then to anyone that would purchase them. The plaintiffs reproduce such prints in any shape that customers desire—for circus purposes, for theatrical purposes, and for various other purposes. They may have the opportunity to sell them, reproduced in wood-cuts or steel as illustrations for a magazine or newspaper. The designs are not confined to use as advertisements, and the defendant should not be allowed to belittle their value for other purposes by reproductions on small electrotype plates, in a cheap and inferior way.

That they are not “pictorial illustrations” within the law, is untenable. Congress must be deemed to have used words in their ordinary sense. To illustrate is “to make clear, bright or luminous, to exhibit distinctly or conspicuously” (Webster’s Inter. Dict.). “Pictorial illustrations,” therefore, are pictures that make the subjects clear and exhibit them “distinctly and conspicuously.” *The only important use of chromos has always been for advertising purposes.* Advertising has itself become an art, useful in its sphere, and employs the talents of many. Both for the purposes of fair competition and that the circulation of artistic matter may be promoted, congress has extended protection by copyright, without limitation, to chromos and such prints, cuts, or engravings as are pictorial illustrations. To exclude advertising matter would practically nullify the act.

It is submitted both that there is no distinction between the *useful* and the *fine arts*, as assumed by the court below, and that the case which the court cited (*Almy vs. Jones*, 17 R. I. 266; 21 Atl. Rep. 616) is not an authority therefor. If an art

is entitled to the rank of a fine art it is useful. It may not supply material necessities of the race, but the cultivation of aesthetics and the edification of the soul are important functions of human life to which the fine arts contribute.

What is included among the fine arts is largely a matter of taste and probably for that reason congress has avoided the use of the term so far as possible. For example, some might class both poetry and the drama as among the fine arts, while others may regard them as frivolous and even immoral in tendency. There is no well-defined line of distinction between the circus and the stage. Both attempt to embody in their entertainments attractive features of the other. The law therefor has drawn no distinction between them. There may be some who think them frivolous or even immoral in tendency, but the majority of people both by their patronage and the enactment of laws have given them their approval. Instead of being unlawful both state and nation have encouraged them by laws calculated to regulate and promote their interests. The act of August 15, 1856, was for the especial protection of dramatic compositions, and they have been especially favored in the matter of penalties and remedies ever since (see § 4966 U. S. R. S.). It is common knowledge that athletics are the frequent object of public encouragement and patronage.

If the circus and the stage have the right to exist — which none will deny — they have the right to advertise, and persons preparing advertisements at large expense to sell for that purpose, should not be the victims of piracy. Congress, in the exercise of its undoubted authority, has recognized the arts employed in this, as well as other kinds of advertising, as useful and entitled to protection — in the interest alike of the advertiser, the printer and lithographer, and the public. The discretion of congress in so doing is not open to review.

The copies in evidence are what is classed as "window work" — that is they are designed for hanging in windows so that people passing may view them. Like the drop curtain of a theater, or most any other like picture, they are intended to be viewed from a short distance; and the effort of the artist is to design and etch the stone so that it will take up the ink in such a way as to present to the passing public a tasty and attractive picture. That the chromos or lithographs in suit are calculated to "lure men to a circus," instead of being an objection, shows the skill of the artist. They may not belong in the category of the fine arts, but that they are artistic for the purposes for which they are designed cannot be denied.

Whether a chromo or lithograph is valuable enough "to lift it above utter insignificance and worthlessness" (60 Fed. Rep. 758, 765) must be determined by the standards of the lithographer's

art, and not by those of the painter or sculptor. Congress can not be deemed to have intended that chromos should be judged by the standards of Raphael or Praxiteles.

The "Spectacular Ballet Design" fairly depicts, in a large measure at least, the effect produced by the chorus of the ballet, under the accompaniments of colored lights and other stage paraphernalia. If found in a magazine, illustrating an article on the opera at the present day, and printed with rich materials, would the court hesitate for a moment to pronounce the design a legitimate subject of copyright? The "Stirk Family Design" fairly depicts the sort of feats performed by a family of athletes. If found in a work on modern athletics, printed with rich materials, would the court doubt that the plaintiffs might protect the design by copyright? The "Statuary Act Design" depicts symbolic representations of a number of historic and classic events. If found in a work on ancient and modern art, would the court hesitate in pronouncing the design the subject of copyright?

The fact that these designs are useful for advertising a circus, and have an additional value for that purpose, does not exclude them from other fields nor deprive them of the protection of copyright. Even as show bills they possess a value as a means of education: they tell a story, illustrate events of history and of classic imagination, and depict achievements of dramatic art and athletic training. They are the products of skill and of a cultivated imagination. The artist commanded a salary of \$100.00 a week (Printed Record, page 36) for making them, and it is submitted that they are works requiring skill and experience.

The Supreme Court of the United States has held that photographs are the subjects of copyright "so far as they are representatives of original intellectual conceptions of the author" and that "posing Oscar Wilde in front of the camera, selecting and arranging the costumes, draperies and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement or representation" producing the photograph in suit, constituted it an original work of art within § 4952 of the Revised Statutes.

Burrow-Giles Litho. Co. vs. Sarony, 111 U. S. 53;
28 L. Ed. 349.

It is submitted that these elements of originality and art dwindle into insignificance compared with the training, skill

and taste necessary for the intellectual conception of the lithographic artist, and the evolution thereof into designs which can be etched on stone in a manner to take up various colors and tints, and present to the public, viewing from a distance, the artistic and attractive pictures in evidence in this case.

It is further submitted that on the authority of the cases heretofore cited the court should hold as a matter of law that the chromos or lithographs in suit are the subjects of copyright.

If, however, there is any question that the chromos or lithographs are the original fruits of intellectual labor and artistic skill, it is one of fact for the jury and not of law for the court.

Bolles vs. Outing Co. Limited, 77 Fed. Rep. 966.

POINT II.

The copyrights were completed prior to publication.

No question was raised, by the counsel for defendant, as to the "Spectacular Ballet Design," or as to "Stirk Family Design." The proof was conclusive that these copyrights were completed on the 11th day of April, 1898, and that the first copies thereof left the office of the Courier Company on that day. The court, however, in its opinion (page 65 Printed Record), says that it would be "its duty to comment upon that portion of the evidence of the plaintiffs which seemed to indicate a possible publication" of these two designs prior to this time.

The evidence to which the court referred were questions which the trial judge himself asked of Mr. Rudolf (Printed Record, page 43), from which it appears that these lithographs, along with a large quantity of others, were printed and remained in the plant of the plaintiffs until they were shipped, some of them possibly several days prior to the shipment. The court seems to think that this raises a question for the jury as to a publication. If that were true few copyrights could be secured. All books have to be set up in type, a part at a time, and printed part by part. So lithographs, especially chromos or colored lithographs, have to be printed a color at a time. It cannot be assumed that congress intended to exclude an article, made according to ordinary methods, and retained by the proprietor until the copyright was completed. But the authorities are legion upon that subject, and we will cite them in detail under the question of whether or not the "Statuary Act Design" was published prior to copyright.

Publication is a legal conclusion which follows from certain acts.

“And for a definition of publication, we find it stated in *Drone on Copyright* (p. 291): ‘A book is published when printed copies are sold unconditionally to the public. * * * To constitute a publication it is essential that the work shall be exposed for sale or gratuitously offered to the general public, so that the public, without discrimination as to persons, may enjoy that for which protection is granted. Printing itself cannot amount to a publication, for the obvious reason that a book may be withheld from the public long after it has been printed.’”

Jewelers Mercantile Agency vs. Jewelers Publishing Company, 84 *Hun*, (N. Y. Sup. Ct.) 12, 16.

In *Prince Albert vs. Strange* (2 De Gex & Smale, 652; 1 Macnaghten & Gordon—47 Eng. Ch. Rep.—25), it was held that where a printer had been employed to take a few impressions, and some of them had been distributed to the personal friends of the authors, the rest being kept in their private apartments, that it did not constitute a publication.

In *Exchange Telegraph Co., Ltd. vs. Central News, Ltd.* (Law Rep. 1897, 2 Ch. Div. 48), it was held that the transmission of telegraphic information of horse races, etc., to subscribers under a contract not to publish except in their own papers or club rooms was not a publication.

In *Kiernan vs. Manhattan Quotation Tel. Co.* (50 How. Pr. [N. Y.] 194), it was held that the transmission of financial news by telegraph to one's own subscribers for their own use is not a publication.

In *Belford, Clarke & Co. vs. Scribner* (144 U. S. 488; 36 L. Ed. 514), and in *Garland vs. Gemmill* (14 Canada Sup. Ct. Rep. 321), it was held that the deposit of copies in the office of the Librarian of Congress or the Minister of Agriculture, before copyright had been secured, did not constitute a publication; the court saying that the argument that it did was “ingenious, but fallacious.”

The representation of a play upon the stage regularly at a theater, does not constitute a publication.

Thompkins vs. Halleck, 133 *Mass.* 32.

Palmer vs. De Witt, 47 *N. Y.* 532.

Boucicault vs. Hart, *Fed. Cases*, No. 1692.

The use by a teacher of his manuscript and allowing pupils to make copies for the purpose of obtaining his instruction, does not amount to a publication.

Bartlett vs. Crittenden, Fed. Cases, Nos. 1076 and 1082.

The printing of copies of an operetta and distributing them to artists, for private use only in learning their parts, and the representing of the operetta on the stage is not a publication.

French vs. Kreling, 63 Fed. Rep. 621.

In *Callaghan vs. Myers* (128 U. S. 617; 32 L. Ed. 547), the court held as to volume 34 of the Illinois Reports, the copyright in which had been completed on the day of publication, that the presumption was that the copyright was completed prior to the publication, using these words:

"In the absence of evidence to the contrary, which it was open to the defendants to introduce, *it must be presumed that the deposit of the title was made in each case before publication, * * ** *It must be presumed, in the absence of evidence to the contrary, that the deposit of the title preceded the publication* and that the delivery of the copies to the Secretary of State preceded the deposit of the work in the clerk's office. Where the three things are prescribed by the statute to be done in consecutive order, and all three appear to have been on the same day, it will be presumed that the statute was complied with, leaving the *prima facie* evidence open to be rebutted."

Where a publisher announced in advance the date on which a book would be published, and three days prior thereto shipped copies of the work to dealers, together with instructions that the same were not to be sold or in any way offered to the public until the given day; in the absence of proof to the contrary, *it is be presumed that publication did not take place prior to the date fixed.*

Black vs. Henry G. Allen Co. 56 Fed. 764.

The lithograph known as "The Statuary Act Design," which the court holds was published prior to the completion of the copyright (Printed Record, page 64), is entirely within the cases above collated, especially the last one. The evidence in this regard is undisputed. Mr. Rudolf testifies (Printed Record, page 40) that the application for the "Statuary Act Design" was deposited in the post office, at Buffalo, N. Y., addressed to the Librarian of Congress at Washington, D. C.,

on the 15th day of April, 1898. This authorized publication on that day under § 4956 of the Revised Statutes. The postal card received in evidence (Printed Record, page 57) from the Librarian of Congress, reads as follows:

"The Courier Litho. Co.: Dear Sirs—In accordance with the application *contained in yours of 15th*, copyright entry has been made under date of April 18, 1898, for your lithos entitled 'Statuary Act Design,' and one other title. Copyright certificate will follow in about 40 days."

It is conceded by the plaintiffs, and established by the depositions of John G. Miller, Burt J. Hagle and George A. Scheffler (Printed Record, pages 48, 51 and 52), and by the testimony of Mr. Rudolf (Printed Record, page 39) that the first copies of the lithograph in question were shipped, packed with others in boxes, from the plant of the plaintiff on April 11, 1898, by freight, addressed to the agent of the Wallace Shows, at Peru, Ind. They had been ordered to be at Peru April 15th, in order to be in time for the advertising car, which was to start out on, or soon after that day, for the purpose of distributing advertising matter. (Printed Record, pages 39, 40 and 54.) On this same day, April 15th, the application and two copies of the lithographs were deposited in the mail at Buffalo, addressed to the Librarian of Congress. (Printed Record, pages 40 and 57.)

Publication would occur only when the lithographs were distributed to the public generally. The time fixed for the departure of the advertising car on this mission was on, or soon after, this same day, April 15, 1898. This establishes *prima facie* that the copyright was completed prior to publication.

Black vs. Henry G. Allen Co. 56 Fed. Rep. 764.

Callaghan vs. Myers, 128 U. S. 617; 32 L. Ed. 547.

Reed vs. Carusi, Fed. Cases, No. 11642.

Blume vs. Spear, 30 Fed. Rep. 629.

POINT III.

The plaintiffs properly took out their copyrights in their copartnership, association, or trade names.

"The Courier Company" and the "Courier Lithographing Company," are what is known under the laws of New York as unincorporated joint stock associations, both consisting of the plaintiffs in this action. They are practically copartnerships. They differ from other copartnerships only in the relation of

the members to each other, which difference is based entirely upon the articles of agreement by which they are organized. As to third parties, the members are copartners, jointly liable for the acts and debts of the firm.

Such associations are organized freely, like other partnerships, in such manner and upon such terms as the members deem suitable for the business proposed to be done and without any statutory authority. Statutes have been enacted, however, giving effect to certain provisions frequently included in the articles of association of such companies, which might otherwise be ineffectual; but not interfering with the recognized principle that such *associations are voluntary organizations, based on contract, and have no existence apart from the individuals composing them.* In New York and some other states statutes have been passed requiring them to file annual certificates, giving certain information to the public.

The statute in force at the present time in New York is the "Joint Stock Association Law" (Ch. 235, Laws of 1894), but it contains no provision which is claimed to be material in this action. The intimation in the opinion of the trial court, that the "Courier Company is recognized by the laws of New York," while the "Courier Lithographing Company is a nonentity," has no foundation either in the evidence or in fact. Both are alike recognized by the common law as legitimate associations of individuals for combined effort and mutual advantage; but neither of them, any more than other partnerships, has any legal existence apart from the members that compose it.

"Joint stock companies and unincorporated associations, unless otherwise provided by statute, are treated as, and have all the attributes of, a common partnership, there being no intermediate step between a partnership and a corporation known to the common law."

17 *Amer. and Eng. Ency. of Law*, 863 (1st Ed.).
Whitehead vs. Allen, 4 *Abb. Ct. App. Decisions*
 (N. Y.) 628.

Upon this subject we quote the words of the court of last resort in the State of New York:

"But I think there was an original and inherent difference between the corporate and joint stock companies known to our law which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical and well supported by authority. It is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organ-

ization of a joint stock company leaves the individual rights and liabilities unimpaired and in full force. * * * The creation of the corporation merges and drowns the liability of its corporators, the creation of the stock company leaves unharmed and unchanged the liability of the associates; the one derives its existence from the contract of individuals, the other from the sovereignty of the state. The two are alike but not the same. More or less, they crowd upon and overlap each other, but without losing their identity, and so, while we cannot say that the joint stock company is a corporation, we can say as we did say in *Van Aernam vs. Bleistein* (102 N. Y. 360), that a joint stock company is a partnership with some of the powers of a corporation."

People, ex rel., Winchester vs. Coleman, 133 N. Y. 279, 283 and 286.

Several states, including Ohio, have provided that actions may be brought by or against a partnership in certain cases in the firm name, but in the absence of statute, the firm has no legal existence, and the action must be brought in the names of the copartners. Even where such statutes have been enacted, they are permissive in character, and do not exclude the right to proceed in the name of the individuals.

17 *Amer. and Eng. Ency. of Law*, 1236 and 1250 (1st Ed.)

There is no statute in New York permitting an action to be brought in the name of a partnership or unincorporated association, but the Code of Civil Procedure provides (§§ 1919-1924) that actions may be brought at the option of the party bringing them by or against unincorporated associations consisting of seven or more members, in the name of the president or treasurer.

The plaintiffs are copartners, doing business under the names "Courier Company" and "Courier Lithographing Company." It is submitted that they can do business under either or both names.

"So a firm may have several names, which is often the case where a firm has a place of business in two or more different cities, in which case all of the members are equally liable on its contracts, at whichever place or under whatever name they may have been made."

17 *Amer. and Eng. Ency. of Law*, 915 (1st Ed.)

Wright vs. Hooker, 10 N. Y. 51.

Hunt vs. Semonin, 79 Ky. 270.

Sneed vs. Kelly, 3 Dana (Ky.) 538.

In re Williams, Fed. Cases No. 17707.

The plaintiffs do a vast business, and are at liberty, if they find it convenient, to do a portion of it under one name, and another portion under a different name. Even corporations, like individuals and partnerships, find it convenient to have trade names under which they do different portions of their business. For example, most negotiable paper is issued by corporations in the name of "A. B., Cashier"; "C. D., Manager"; "E. F., General Superintendent," etc., etc.; and despite the well-settled principle that only parties are liable on negotiable paper, and that the addition of the word "agent" or "manager," or etc., is usually *designatio personæ*, the corporation and not some irresponsible agent, is held liable because it is in fact a party—the paper being executed by the corporation in the trade name which it had adopted as it might lawfully do for that portion of its business.

Hascall vs. Life Association of America, 5 Hun, (N. Y. Sup. Ct.) 151; *aff'd on this opinion*, 66 N. Y. 616.

Bank of New York vs. State Bank of Ohio, 29 N. Y. 616.

First Nat. Bank of Angelica vs. Hall, 44 N. Y. 397.

Hanover Nat. Bank vs. American Dock and Trust Co., 148 N. Y. 612.

It is submitted that the plaintiffs were at liberty to take out their copyrights in either of their well-established copartnership or trade names and that the validity thereof cannot be made to depend upon which one they selected.

Two partners, doing business under the firm names of "Messrs. Rock, Brothers & Payne," and "Messrs. Rock & Co." had taken out copyrights in their trade names. The right to do so being questioned the court held; "I think that the trading name of the firm is a sufficient designation, inasmuch as it enables parties to know whom to apply to for information, and whom they must sue."

Rock vs. Lazarus, *Law Rep.*, 15 Eq. Cases, 104.

A copyright registered in the firm name of "Newby & Co." is sufficient.

Weldon vs. Dicks, *Law Rep.*, 10 Ch. Div. 247.

The first section of the Revised Statutes of the United States provides that throughout the revision "the word 'person' may extend and be applied to partnerships and corporations." The copyright statutes therefore, providing for copyrights to individuals, include partnerships.

In *Scribner vs. Clark* (50 Fed. Rep. 473) the copyright of the first edition had been taken in the name of "Charles Scribner & Company, proprietors," and of the second edition in the name of "Charles Scribner's Sons, proprietors," and the validity thereof was sustained. On appeal to the Supreme Court this case was affirmed; the court saying "that the copyright was secured in accordance with law in both editions of the book by the proprietors."

Belford, Clarke & Co. vs. Scribner, 144 U. S. 488;
36 L. Ed. 514.

In *Scribner vs. Henry G. Allen Co.* (49 Fed. Rep. 854) the copyright had been taken out in the name "Charles Scribner's Sons," and was held valid; the court saying: "At common law, individuals are permitted to carry on business under any name or style which they care to adopt, and if persons trade or carry on business under a name, style or firm, whatever may be done by them under that name is as valid as if real names had been used."

In *Werckmeister vs. Springer Lithographing Co.* (63 Fed. Rep. 808) the copyright was taken out by the plaintiff in the name "Photographische Gesellschaft." The court quoted the above from the case of *Scribner vs. Henry G. Allen Co.*, and again held that the principle there stated was applicable to copyrights.

In *Callaghan vs. Myers* (128 U. S. 617; 32 L. Ed. 547) the copyrights were taken out in the name of "E. B. Myers & Chandler," and the court sustained their validity.

These cases establish the law, so far as any principle can be established by judicial decision, that the plaintiffs were entitled to take out their copyrights in their copartnership or trade names.

POINT IV.

The plaintiffs were entitled to take out copyrights as proprietors of the work of their employees.

This right is well settled in this country, as well as in England and Canada. In a case in England the plaintiffs were proprietors of a weekly paper styled "The Jurist," and employed barristers by verbal agreement to furnish reports of such cases as they thought desirable for publication. Nothing was said as to whether or not the authors should reserve the right to publish the reports themselves, or whether the plain-

tiffs should have the right to a copyright. The authors were paid a stipulated price per sheet. The case was very carefully considered, four separate opinions being written, from one of which we quote the following:

" * * * I believe we all remain of the same opinion—that where the proprietors of a periodical employ a gentleman to write a given article, or a series of articles or reports, expressly for the purpose of publication therein, of necessity it is implied that the copyright of the articles so expressly written for such periodical, and paid for by the proprietors and publishers thereof, shall be the property of such proprietors and publishers; otherwise, it might be that the author might the day after his article has been published by the persons for whom he contracted to write it, re-publish it in a separate form, or in another serial, and there would be no correspondent benefit to the original publishers for the payment they had made. For these reasons, I think, and my learned brothers all concur with me, that, under the circumstances stated in this case, there is an implied condition, understanding or arrangement between the proprietors of *The Jurist*, and the gentlemen who furnish them with reports or other articles for publication therein, that the former shall acquire a copyright in the articles so written for and published and paid for by them."

Sweet vs. Benning, 81 *Eng. Com. Law Rep.* 459; 16 *Common Bench Rep.* 459.

To the same effect are the following:

Grace vs. Newman, *Law Rep.* 19 *Eq. Cases*, 623.
Petty vs. Taylor, *Law Rep.* 1897, 1 *Ch. Div.* 465.
Froude vs. Parrish, 27 *Ont. Rep.* 526; *aff'd on opinion below*, 23 *Ont. App. Rep.* 728.

In a suit brought by the equitable owner of the notes to certain editions of "*Wheaton's Elements of International Law*," for the purpose of restraining the legal owner and her publishers, and to compel an assignment of the copyright, it appears that the work had been furnished by the plaintiff gratuitously, under an agreement that Mrs. Wheaton might use it for two editions of the work, but not otherwise without his consent. She took out the copyrights in her own name, and the plaintiff claimed that she held them in trust for him for all purposes except the particular editions for which he had furnished them to her.

The prominence of the parties and their relations to each other; the peculiarities of the case; the eminence of coun-

sel; the care, learning, and elaborateness with which the case was presented; the multitude of questions involved; and the scope and erudition of the opinion of the court, render it a leading case on the law of copyrights in this country. From the opinion of Circuit Justice Clifford, we quote the following:

"Although the services were gratuitous the contributions of the complainant *became the property of the proprietor of the book*, as the work was done, just as effectually as they would if the complainant had been paid daily an agreed price for his labor. * * * Guided by these views, the court is of the opinion that none of the authorities cited by the respondents to show that a written assignment from the complainant to Mrs. Wheaton was necessary have any proper application to the question under consideration, because the complainant never acquired any right to demand a copyright in his contribution to those two editions, *but the contributions, as they were made and composed, or put in form, became vested in the proprietor.* * * * Then the respondents contend that the copyrights are void, because, as they insist, the applicant for the same was a mere licensee of the author of the notes; but the court is of a different opinion, for the reasons already given, as well as for others yet to be mentioned. * * * Arrangements of the kind, it is believed, are frequently made between the proprietors of books and editors employed to prepare notes or other improvements to successive editions; and it is not perceived that there is any legal difficulty in upholding such a contract where, as in this case, it violates the rights of no one, and is entirely consistent with the public right."

Accordingly, it was held that the copyright was properly vested originally in the proprietor although the work had been performed gratuitously.

Lawrence vs. Dana, Fed. Cases No. 8136.

In *Little vs. Gould* (Fed. Cases, No. 8395) the copyrighted volumes of the reports of the Court of Appeals of the State of New York had been prepared by the official reporter, Comstock, who received a stipulated salary for his services. Under the laws of the state it was provided that copyrights should be taken out in the name of the Secretary of State in trust for the people. It was held, in a very carefully considered opinion, that the state, as the employer of the reporter, became the proprietor of his work and authorized to take out copyrights in the name of its Secretary of State as trustee.

In *Schumacher vs. Schwenck* (25 Fed. Rep. 466) it was held that a painting, designed by the president, but copied in part from a wood-cut by an Italian artist, and painted by an employee, is properly copyrighted in the name of the corporation as proprietor. It was also held that the fact that the painting was capable of being lithographed and used as a label for cigar boxes, would not affect the copyright.

No formal assignment of the right to a copyright is necessary. "Consent" is sufficient to constitute one the proprietor for the purpose.

Carte vs. Evans, 27 Fed. Rep. 861.

"The literary product of a salaried employee, the result of compilations made in the course of his employment, becomes the property of the employer, who may copyright it."

Colliery Engineer Co. vs. United Correspondence Schools Co., 94 Fed. Rep. 152.

The court below seems to have completely confounded the legal status of the "Courier Company" and the "Courier Lithographing Company." The artist Bandlow was employed by the plaintiffs to furnish such designs as they needed regardless of the name under which they sold his work. As we have already showed neither company had any legal existence apart from the plaintiffs. They were the real employers and proprietors of the work. The distinction, therefore, made by the court below (Printed Record, pages 65, 66) that they might be proprietors of the work of an employee provided they claimed it under one trade name but not if claimed under the other, is without foundation either in reason or authority.

It is submitted, since § 4952 of the Revised Statutes authorizes copyrights to "proprietors" and § 1 thereof declares that where persons are mentioned it shall extend to partnerships, and since the lithographs or chromos in suit were designed by an employee, at a big salary, under the distinct agreement that the products of his talent were to be the property of the plaintiffs (Printed Record, page 36), that the plaintiffs are fairly within the letter and purpose of the law and that they are entitled to the protection afforded by their copyrights. The decisions above collated establish this beyond a peradventure.

POINT V.

The court erred in the rejection of the evidence offered by the plaintiffs and specified in the assignment of errors. (Printed Record, page 19.)

(1) The plaintiffs offered in evidence the official catalogue, printed as required by §4958 of the Revised Statutes, containing a list of title entries upon which the copyrights had been completed by the deposit of two copies of the article with the Librarian of Congress. This was rejected by the court. An exception was duly taken. (Printed Record, pages 28, 29.) This evidence was competent. All official records are admissible without any special statutory provision.

Evanston vs. Gunn, 99 U. S. 660; 25 L. Ed. 306.

(2) Upon cross-examination of the witness Mr. Bleistein, the defendant's counsel proved that the lithographs in suit were known as "special matter," that is, matter prepared by the plaintiffs after the making of an agreement with Mr. Wallace, proprietor of the Wallace Shows, for the purchase of a specified quantity thereof; also that it was the custom of the trade not to sell to others, so long as the party first contracting for such new matter desired to purchase it.

The plaintiffs sought to show, after this evidence had been introduced, that it was the custom of the trade for the makers to sell to others whenever the original purchaser ceased to buy. This was rejected by the court, and an avowal that the plaintiffs could show the same, duly entered upon the record and an exception taken to the ruling of the court. (Printed Record, pages 32, 33.)

The defendant evidently introduced this proof as the basis of an argument, that the designs were made exclusively for use as advertisements of the Wallace Circus, and were of no value to the plaintiffs. The defendant having shown a part of the custom, or usage, of the trade, can there be any doubt that it was relevant material, and proper for the plaintiffs to show the balance of it, as they avowed they could show, for the purpose of refuting the contention of the defendant?

(3) The plaintiffs offered in evidence a photograph, duly proved to have been taken from the "Spectacular Ballet Design," reduced to the size of the pirate sheets seized in the possession of the defendant, together with the negative. This

was for the purpose of allowing the jury to make comparisons, and in so doing to lay the glass of the negative upon the defendant's electrotpe copy of the plaintiff's lithograph, and note that the same were identical, line for line. (Printed Record, page 41.)

The answer puts in issue the infringement by the defendant, and it is submitted that this evidence was admissible, and that the court erred in rejecting it.

(4) The court, after the defendant's counsel had finished his cross-examination, proved by the witness Mr. Bleistein that that the designs in suit had been made by an employee of the plaintiffs named Bandlow. The plaintiffs then proved that Mr. Bandlow had been employed by them in doing the same kind of work for at least four years; that the contract of employment was that he should receive \$100.00 a week for making designs, which were to be the property of the plaintiffs (Printed Record, page 36); and tried to prove that during the four years of his employment, Mr. Bandlow had been engaged in making similar designs on which the plaintiffs had been accustomed to take out copyrights as proprietors or not, at their option. But the court excluded the evidence.

This was clearly relevant and proper, as showing the understanding between the plaintiffs and their employee to the effect that they were the owners and entitled to copyrights on his work. Acquiescence for four years by the parties in a certain construction of a contract is evidence of the intention of the parties in making it.

Paige vs. Banks, 13 Wall, 608; 20 L. Ed. 709.

POINT VI.

The plaintiffs are entitled to recover, on each of the three causes of action, the pirate sheets and plates, and one dollar (\$1.00) for each sheet found in the possession of the defendant, one-half for themselves and one-half to the use of the United States.

The court below intimated (Printed Record, page 61) that the limits for recovery were between \$250 and \$10,000, and in another case, which is referred to in the opinion, allowed the jury (as we are informed by the clerk) to fix the amount between the limits prescribed by the statute. This we submit shows clearly a misunderstanding of § 4965 of the Revised Statutes of the United States, and we are entitled

to have this corrected so that we may not have to come before this court on the measure of recovery after another trial.

The statute prescribes that any one pirating a copyrighted article "shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession. * * * Provided, further, that in case of any such infringement of the copyright of a painting, drawing, statue, *engraving, etching, print, or model or design for a work of fine arts*, or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars and not more than ten thousand dollars.

Does this *limitation apply at all to a chromo*?

Under the statute the plaintiffs are entitled to recover one dollar for each sheet found in the possession of the defendant, unless they are limited to \$10,000 as to each separate cause of action.

The proof is that the marshal seized in the possession of the defendant 10,590 eight-page prints and 13,205 four-page prints, specimens of which are in evidence as Exhibits "G" to "L". (Printed Record, pages 13 and 46.) The eight-page prints contain upon one page thereof pirate copies of all three of the lithographs in suit, and the four-page prints contain upon one page thereof pirate copies of the "Spectacular Ballet Design" and of "The Stirk Family Design."

A novel question is presented to the court. Three causes of action are united. The four-page prints seized contain violations of two of the copyrights, and the eight-page prints of all three. It has been held that where one sheet contains several pirate copies of one copyrighted photograph that the recovery is confined to the penalty per sheet irrespective of the number of violations on it. *Falk vs. Heffron* (56 Fed. Rep. 299). But that is not this case. Here the violations are of different designs, and we submit that we are entitled to recover for each cause of action on a sheet.

See: *Snow vs. Mast*, 65 Fed. Rep. 995, and § 921
United States Revised Statutes.

Whether the limitation between \$250 and \$10,000 be held to apply to the lithographs or chromos in suit or not, we submit that the statute means that *in case less than two hundred and fifty* pirate sheets be found the plaintiff may nevertheless recover \$250, and in case *more than ten thousand* pirate sheets be found only \$10,000 can be recovered on a single cause of

action. *The statute simply fixes the penalty at \$1.00 per sheet within these limits and does not leave it to the caprice of the jury as thought by the court below.*

In *Millett vs. Snowden* (Fed. Cases, No. 9600) it was held that intent to violate a copyright was immaterial, and as to the amount of recovery uses the following language:

"In cases of patents, the jury is at liberty to assess damages, but not in violation of copyright. The jury, if they consider that defendant has republished without leave obtained in writing from plaintiff, must proceed to ascertain the number of sheets proved to have been sold, or offered for sale (not the number printed), and return a verdict of one dollar for each sheet so sold or offered to be sold."

In *Bolles vs. Outing Co.* (77 Fed. Rep. 966, 968) the Circuit Court of Appeals says:

"The statute is apparently framed to give the party whose copyright has been invaded complete relief by an action in which he can procure a condemnation of the infringing sheets and at the same time recover, by way of compensation, a penalty for every sheet which he is entitled to condemn."

Where the court charged the jury that if they found that the pirate copies seized in the possession of the defendant were copies of the "main design, the substantial ideas and the distinctive characteristics" of the plaintiff's copyrighted photograph, "then your verdict will be for the plaintiff for \$3,000," the number of sheets seized in the possession of the defendant, it was held, on appeal to the Circuit Court of Appeals, that this charge was all the defendant was entitled to.

Springer Litho. Co. vs. Falk, 59 Fed. Rep. 707.

The defendant is entitled to no sympathy either in law or in fact, as the court below seems to intimate in its opinion. The plaintiffs only claim protection of their designs. The penalty prescribed is simply to enforce their copyrights. The distinction drawn by the court below (Printed Record, page 66) that they claim the "enormous protection of not only the exclusive right to print them [chromos], but the additional protection of a penalty of a dollar each for reprints from them," is simply incomprehensible. The defendant's officers knew these designs were copyrighted. (Printed Record, pages 44, 45.) The penalty being confined to the prints found in possession of defendant is not "enormous," and if it were relief must be sought from congress.

We are not asking to recover for the hundreds of thousands probably sold prior to the seizures; nor for other copyrights

previously violated by the defendant, and as to which the plaintiffs dropped proceedings on the promise not to violate further—all of which it would have been improper to introduce into the case.

It is submitted, on the authorities above cited, and by virtue of the statute, that the plaintiffs are entitled to recover, as to each cause of action, one dollar for each sheet found in the possession of the defendant, and that on the proof, the only questions for the jury were as to whether the prints seized were copies of the plaintiffs' designs.

At all events the plaintiffs were entitled to recover at least \$10,000 for the violation of any one of the three copyrights in the eight-page prints; and at least \$10,000 for the violation of either of the other copyrights in the four-page prints, one-half for themselves and one-half to the use of the United States.

POINT VII.

The judgment of the court below should be reversed with costs to the plaintiffs in error and the case remitted to the Circuit Court, District of Kentucky, for a new trial with proper instructions upon the foregoing points.

Dated March, 1900.

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United States Circuit Court of Appeals,
FOR THE SIXTH CIRCUIT.

*George Bleistein et al., doing business under the name
of the Courier Company and the Courier Litho-
graphing Company,*

No. 819.]

vs.

Plaintiffs in Error,

The Donaldson Lithographing Company,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

E. W. KITTREDGE,

For Defendant.

COBB & HOWARD,

KITTREDGE & WILBY,

Of Counsel.

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BRIEF FOR DEFENDANT IN ERROR

The statute under which the action is brought is highly penal. The action is for excessive penalties under it. The statute is to be strictly construed in favor of the defendant. Under it, it is necessary to aver as well as to prove all the facts necessary to render the defendant liable. As was said by the Court in *Rosenbach v. Dreyfuss*, 2 Fed. Rep. 217, at 224 :

“ The complaint must state a case for recovery with reasonable certainty, and in a case of doubt a pleading must be taken most strongly against the pleader. It is not enough that the defendant *may* be liable, if the facts stated are true, it must appear that he *is* liable.”

The opinion in the above case refers to a case in 9

Weekly Digest (N. Y.), 340, decided by Judge Blodgett, under a similar statute, where the Court say :

“ This being a highly penal statute, it was the duty of the pleader in making a case under it, to negative all presumptions in favor of the innocence of the defendant.”

See also, *Marsh v. Warren et al.*, 18 Blatch. 263.

Bennett v. Carr, 96 Fed. Rep. 213.

Bolles v. Outing Co., 175 U. S. 262.

The argument of the plaintiffs in error in this case starts with the proposition that the lithographs in question are *chromos* or *chromo lithographs*. And it is said that the word *chromo* is defined as “a picture printed in tints and colors by repeated impressions from a series of stones prepared by the lithographic process.”

The petition does not allege that the pictures in question are *chromos* or *chromo lithographs*, or that they are pictures printed in tints and colors by separate impressions from a series of stones prepared by the lithographic process. On the contrary, it does allege that they are “lithographic prints, cuts or engravings.” This allegation is repeated many times in the course of the petition.

Again, the petition does not allege that these “prints, cuts or engravings” “are pictorial illustrations or works connected with the fine arts,” as required by the act of 1874, R. S., Sec. 4962, 18 Stats. at Large, 78.

In the case of *Yuengling v. Schile*, 12 Fed. Rep. 107, *chromo lithographs* are defined and distinguished from lithographic prints, and it is held that both *chromos* and lithographic prints are included in the more general term prints, and are subject to the restrictions of the statute applicable to prints in general.

There was not a word of proof offered in the Court below that the prints in question in this case are *chromos*

within any definition cited by the plaintiffs in their brief, or otherwise; nor that they are pictorial illustrations connected with works of art. If the Court should find, by an examination of the record, that the foregoing statement is true, it would seem, without going further, to dispose of the case and the entire argument of our learned adversaries.

It was incumbent on the plaintiffs to allege and prove who was the author, inventor or designer of the prints in question, and that they had title as proprietors from the author or designer to copyright them. The petition alleges that the plaintiffs themselves designed, that is, were themselves the authors or inventors of each of the prints, cuts or engravings. And the petition assumed that, being the authors or designers, they were proprietors thereof in conformity with the laws respecting copyrights.

By examination of the record, it will be seen that they were not in any sense the authors or designers of either of these prints. Even if it had been proved that these prints were designed by employes of the plaintiffs, who were paid by the plaintiffs, under an express or implied contract that their designs should become the property of the plaintiffs, nevertheless this would have been a fatal variance. The petition alleged that the plaintiffs themselves were the authors and inventors, and no issue was presented as to their having acquired title by contract from those who were in fact the authors and inventors.

By looking at the pictures themselves, we find that they are simply advertisements of Mr. Wallace's circus. The proof was clear and uncontradicted that these pictures and each of them were made under a special contract with B. E. Wallace, the owner of the Wallace Show, as an advertisement for his show, and that they have never been made for anybody else (R. 30-31). Mr. Wallace himself furnished his photograph and all the descriptive matter, and as to the rest of the thing (or picture), it was simply a representation of

scenes or attitudes which the Wallace circus presented in their exhibitions. Mr. Wallace himself arranged the designs, *i. e.*, the groupings, etc., for each of these scenes, and furnished all the information of what these scenes were, and was, in every proper sense, the author or designer of these pictures (R. 37-38).

Lithographic Co. v. Sarony, 111 U. S. 60, 61.

The author of a picture is the man who has superintended the arrangement, who has actually formed the picture by putting the people into position and arranging the place in which the people are to be.

“To constitute one an author, he must by his own intellectual labor, applied to the materials of his composition, produce an arrangement or compilation new in itself.”

Atwell v. Ferrett, 2 Blatch. 46.

The author, inventor or designer to be entitled to a copyright must be both the person who invented the arrangement and who gave it visible form by representing it.

Bimms v. Woodruff, 4 Wash. C. Ct. 48.

Mr. Wallace employed the plaintiffs under a contract to get up these prints as “special papers” to represent scenes or attitudes or groups, which they, the Wallace Circus Company, and nobody else, proposed to exhibit as a part of their show. They were, upon their face, advertisements of Wallace’s Circus, and were and could be of no possible use to anybody else. If they were subjects-matter of copyright, and anybody became entitled, as proprietor, to copyright them as an implied condition or understanding growing out of the circumstances under which they were made, it was Mr. Wallace, as the proprietor of the Wallace Circus Company. If an engraving is executed for pay or valuable consideration, for a particular person, as an advertisement of

his property or exhibition, surely the copyright belongs to that person under any implication growing out of the contract of employment under which the work is executed.

The petition alleged that the print called "Statuary Act Design" was deposited under the statute to complete the copyright on the 18th of April, 1898 (R. 6). The evidence left no sort of doubt that this print was published by a shipment to Wallace, at Peru, Indiana, on the 11th of April, 1898, to arrive there on the 15th for distribution by him (R. 44-54). There is no question of presumption arising as to this matter, but if there was, it is incumbent on the plaintiff in a case like this to prove every fact essential to the validity of his copyright.

See *Bennett v. Carr*, 96 Fed. Rep. 213.

THE PRINTS IN SUIT ARE NOT THE PROPER SUBJECTS OF COPYRIGHT.

If the foregoing difficulties are surmounted, and we do not see how they can be, the question arises whether these prints, designed as advertisements of the Wallace show, are subjects of copyright under the law. We ask the Court in entering upon this inquiry to look at the pictures. They are not printed in the record, but will be before the Court. The Court below said of them (R. 64):

"That the pictures offered in evidence in this case are such as are connected with the fine arts, I do not for a moment agree, nor does the evidence leave any question upon the subject, which the Court thinks it necessary to submit to the jury. That the picture which represents a dozen or more figures of women in tights with bare arms and with much of the shoulders displayed, and by means of which it is designed to lure men to a circus, is in any sense a work of the fine arts, or are pictorial illustrations in the sense of the statute, I do not believe. The Court does not

think that it was in any wise intended by Congress that such a picture should be the subject of the exclusive advantages given by the privilege of copy-righting. Instead of being either useful art or fine art, it is something to be regarded as merely frivolous, and to some extent immoral in tendency. . . . The court cannot bring its mind to yield to the conclusion that such tawdry pictures as these were ever meant to be given the enormous protection of not only the exclusive right to print them, but the additional protection of a penalty of a dollar each for reprints from them. As previously stated, they are neither pictorial illustrations nor works connected with the fine arts within the meaning of Section 4952."

That the copyright law does not protect what is immoral in its tendency is abundantly settled. A print representing unchaste acts or scenes calculated to excite lustful or sensual desires in those whose minds are open to such influences, and to attract them to witness the performance of such scenes, is manifestly of that character. It is the young and immature and those who are sensually inclined who are liable to be influenced by such scenes and representations, and it is their influence upon such persons that should be considered in determining their character.

In *Broder v. Zeno Mauvais Music Co.*, 88 Fed. Rep. 74, at 79, the Court, describing the character of immorality that rendered a song not the subject of copyright, said that:

"It had an indelicate and vulgar meaning, and, therefore, was not the subject of protection by the copyright law."

The Supreme Court, in *Dunlap v. United States*, 165 U. S. 501, say:

"The true test of what constitutes obscene literature is that which tends to deprave the morals by exciting sensual desires and lascivious thoughts."

The act for the protection of dramatic compositions is *in pari materia*, and the same considerations applicable to it, in so far as this question is concerned, we submit, are applicable to the case at bar.

The case of the Black Crook, cited by our adversaries (*Martinetti v. Maguire*, Fed. Cases, No. 9173), is quite on a par with the case at bar. The Court, in deciding that case, says :

“The Black Crook is a mere spectacle—in the language of the craft, a spectacular piece. The principal part and attraction of the spectacle seems to be the exhibition of women in novel or no dress, and in attractive attitudes or action. The closing scene is called Paradise, and, as witness Hamilton expresses it, consists mainly ‘of women lying about loose’ (a sort of Mohammedan Paradise, I suppose, with imitation grottoes and unmaidenly houris). To call such a spectacle a ‘dramatic composition’ is an abuse of language, and an insult to the genius of the English drama. In my judgment, an exhibition ‘of women lying around loose,’ or otherwise, is not a dramatic composition, and, therefore, not entitled to the protection of the copyright act. . . . Besides, the power to pass what are called copyright and patent laws, or, as the constitution expresses it, to secure ‘for a limited time to authors and inventors the exclusive right to their respective writings and discoveries,’ is given not generally, but only as a means to this particular end,—‘to promote the progress of science and useful arts.’ Hence it expressly appears that Congress is not empowered by the constitution to pass laws for the protection or benefit of authors and inventors, except as a means of promoting the progress of ‘science and useful arts.’ For this reason an invention expressly designed to facilitate the commission of crime, as murder, burglarly, forgery, or counterfeiting, however novel or ingenious, cannot be patented. So with a dramatic composition, which is grossly indecent and calculated

to corrupt the morals of the people. The exhibition of such a drama neither 'promotes the progress of science or useful arts,' but the contrary. The constitution does not authorize the protection of such productions, and it is not to be presumed that Congress intended to go beyond its power in this respect to secure their authors and inventors the exclusive right to the use of them."

That this exhibition was designed and calculated to lure men to the theater, and in that sense was, as our adversaries claim, a work of art, cannot be doubted. The attempt of our adversaries to distinguish the case in its application upon the ground that the thing sought to be protected was the spectacular exhibition itself, while in the case at bar it is sought to protect by copyright a picture of a spectacular exhibition, is of no avail.

Our learned adversaries inform us that these prints involved in this case are what are called "window-work"—designed for hanging in windows, so that people passing may view them. We are otherwise credibly informed that the police in many of the localities where this circus performed, have suppressed their exhibition in this manner. But, be this as it may, our adversaries admit that these prints do not belong to the category of the fine arts, but they claim that they are artistic for the purpose for which they are designed, to-wit, to lure men to a circus, as the Black Crook exhibition was effective to lure men to the theater (B. 21).

This brings us to a consideration of the proper meaning of the statute, which provides,

"In the construction of this act, the words 'engraving,' 'cut,' and 'print,' shall be applied only to pictorial illustrations or works connected with the fine arts."

It is claimed by counsel for plaintiff in error that the words "pictorial illustrations" are to be taken independently

of and disconnected from the words that follow; and that Congress has provided for the protection of prints, cuts or engravings as pictorial illustrations, without any limitation. They say "to exclude advertising matter would practically nullify the act." Yet the very next clause of the provision in which this language occurs, provides that no prints or labels designed to be used for any articles of manufacture shall be entered under the copyright law. The use of prints for advertising articles of manufacture is thus clearly excluded from protection by copyright.

But how is it possible to construe this language of the statute by disconnecting the words "pictorial illustrations" from their connection with the remainder of the clause? The language is "pictorial illustrations or works," etc. There is no comma after the word "illustrations" as printed in the 18 Stats. at Large, p. 79; and, while this may not be of great significance, it renders the grammatical construction consistent with what we think to be the obvious intent of Congress that these words were to be applied only to pictorial illustrations or works (the latter word being merely an amplification of the former) connected with the fine arts. Every engraving, cut or print is, in some sense, a pictorial illustration of something. That is as true of cuts and prints to be used as advertisements of articles of manufacture as of cuts and prints to be used as advertisements of a circus. To say, as our adversaries do, that cuts and prints are made the subject of copyright without limitation, would be practically to annul the second clause of the provision of the statute in question.

The Supreme Court has just held, in the case of *Bolles v. Outing Co.*, 175 U. S. 265, that, the statute being penal, if the language is ambiguous the Court will lean more strongly in favor of the defendant than it would if the statute were remedial. It does not seem to us that the statute in this case is even ambiguous, and the construction sought to be

given to it by the plaintiffs in error would be in violation of the general policy of the law upon this subject.

It was held in England, in the case of *Cobbett v. Woodward*, L. R. 14, Eq. 407, referred to by our adversaries, that an advertisement is not entitled to protection under the copyright law. Our adversaries cite a later English case in which the decision in *Cobbett v. Woodward* is thought to have been limited in its scope. But our own Supreme Court has cited the case of *Cobbett v. Woodward* with approval, and without any apparent disposition to limit its scope, in *Baker v. Selden*, 101 U. S., at 106. And in *Mott Iron Works v. Clow*, 82 Fed. Rep., the Court, at page 320, after discussing the difference between the English statutes and our own, and the cases which under the English statute were held to limit the authority of *Cobbett v. Woodward*, say :

“The ruling of the English Court is, therefore, not pertinent, except as it illustrates the subject. It is further to be said that the case of *Cobbett v. Woodward*, overruled by the case of *Maple & Co. v. Junior Army and Navy Stores*, has been expressly approved and quoted at length by the Supreme Court of the United States.”

The law in this country is now apparently well settled that a cut or print intended as a mere advertisement of merchandise, is not the subject-matter of copyright.

Our adversaries cite the case of *Schumacher v. Schwencke*, 25 Fed. Rep. 466, as though it was a case of an attempt to copyright a label. A reference to the case will show that this is a mistake. The subject-matter of copyright in that case was a painting, which the court found was of artistic merit. Yet even here the judge, in disposing of the case, uses this language :

“Were it conceded that this painting was intended exclusively for a label, or as the first step in making a label, a much stronger case for the defendants would

be presented. But such is not the fact, and it is clear from the affidavits that it cannot be established by evidence."

In the case of *Mott Iron Works v. Clow*, 72 Fed. Rep. 168, the construction of this statute by the Court was apparently without hesitation. The action was upon a copyright of advertising sheets containing a description of porcelain baths, which also contained cuts or prints of such baths with ornamental settings. And the Court, in determining upon a demurrer whether such cuts or prints were a proper subject-matter of copyright, say, Grosscup, J.:

"The cuts or prints shown in complainant's sheets, in connection with their ornamental settings, may have such artistic merit as would support a copyright if offered as a work of fine art. The statutes, as amended by the act of 1874, *limit the right of copyright to such cuts and prints as are connected with the fine arts*. But the bill does not say that the author or designer intended or contemplated these cuts or prints as works of fine art. No copyright was asked upon them separately from the advertising sheet of which they are a part. They are not offered to the public as illustrations or works connected with the fine arts, but are adjuncts simply to a publication connected with a useful art. The court will not supply an intention that the author or designer has not avowed, or give to the cuts and prints a character and purpose different from what their surroundings indicate." Demurrer sustained.

In this case upon appeal to the Circuit Court of Appeals for the Seventh Circuit, 82 Fed. Rep. 316, the Court, referring to the cuts or prints in the illustrated catalogue, say (p. 318):

"In brief, they are mere advertisements of the appellant's wares, with nice cuts or illustrations of the goods accompanying and forming part of the adver-

tisement, as an allurements to customers. The question, therefore, which confronts us, is, were such things intended to be protected by the constitutional provisions in question?"

This is followed by a general discussion of the constitutional provision and of the act of Congress, which is concluded by the following language referring to the case of *Higgins v. Kueffel*, cited by our adversaries (p. 321):

"In the later case of *Higgins v. Kueffel*, 140 U. S. 428, the court observes that the provision of the constitution 'evidently has reference only to such writings and discoveries as are the result of intellectual labor;' and, 'to be entitled to a copyright, the article must have of itself some value as a composition, at least to the extent of serving some useful purpose other than as a mere advertisement or designation of the subject to which it is attached.' So far as the decisions of the Supreme Court have gone, we think they hold to the proposition that mere advertisements, whether by letterpress or by picture, are not within the protection of the copyright law. It is possibly not beyond comprehension that pictures of slop sinks, wash bowls and bath tubs, with or without letterpress statement of dimensions and prices, though intended mainly for advertisement, may, in localities where such conveniences are not in common use, be the means of instruction and advancement in knowledge of the arts, and, when they are the product of original, intellectual thought, may possibly come within the scope of the constitutional provision. It is enough for the present purpose to say that, in our judgment, Congress has not seen fit to enact a law which can reasonably be given so broad a construction."

In *Ehret v. Pierce*, 10 Fed. Rep. 554, which was the case of a color card, intended to represent different shades of paint, the Court say:

"True it has lithographic work upon it, and also

words and sentences; but it has none of the characteristics of a work of art, or of a literary production. It is an advertisement and nothing more."

In *Schumacher v. Wogram*, 35 Fed. Rep. 210, the plaintiff designed a picture representing a young woman holding a bouquet of flowers, to be printed on labels for cigar boxes, which he attempted to copyright, and Wallace J., says:

"The facts show an attempted evasion by the plaintiffs of the provisions of Sec. 3 of the Act of Congress of June 18, 1874, 'to amend the law relating to patents, trade-marks and copyrights.' . . . If the experiment of the plaintiffs can succeed, this statute is inoperative whenever the prints or labels contain a pictorial illustration; and it could be wholly nullified by the device of printing pictures on the labels."

In *Lamb v. School Furniture Co.*, 39 Fed. Rep., the action was upon a book of engravings illustrating the complainant's church furniture. In disposing of the case Severens, J., says:

"It is urged that it is alleged and claimed by the complainants that their illustrations are intrinsically valuable as works of art. I am convinced, however, that they were not published as such, but simply for trade purposes in aid of their sales, and I doubt (though I do not decide) whether they can be regarded in any other light."

In view of these decision can it be doubted:

1. That the statute limits the right of copyright to such cuts or prints as are connected with the fine arts?
2. That the petition does not allege that these prints were designed or contemplated by the author as connected with the fine arts?
3. That no copyright was asked upon them separately from the advertising sheet of which they are a part?

4. That they are not offered to the public as illustrations or works connected with the fine arts?

5. In brief, that they are upon their face mere advertisements of an immoral character?

We submit that the judgment of the Court below should be affirmed.

Respectfully submitted,

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COBB & HOWARD,

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Of Counsel.

FILED
JUN 4 1900

FRANK O. LOVELAND

No. 819.

United States Circuit Court of Appeals

SIXTH CIRCUIT.

GEORGE BLEISTEIN, AND OTHERS, DOING BUSINESS UNDER THE NAME OF THE COURIER COMPANY AND THE COURIER LITHOGRAPHING COMPANY, *Plaintiffs in Error*,

vs.

THE DONALDSON LITHOGRAPHING COMPANY, . . . *Defendant in Error.*

Copyrights.

REPLY TO BRIEF OF DEFENDANT IN ERROR.

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United States Circuit Court of Appeals,

SIXTH CIRCUIT.

GEORGE BLEISTEIN, JOHN W. BRIDG-
MAN, JOHN A. RUDOLF, ANSLEY
WILCOX, GERRIT B. LANSING AND
EDWIN FLEMING, DOING BUSINESS
UNDER THE NAME OF THE COURIER
COMPANY, AND THE COURIER LITHO-
GRAPHING COMPANY,

Plaintiffs in Error,

AGAINST

THE DONALDSON LITHOGRAPHING
COMPANY,

Defendant in Error.

No. 819.

REPLY TO BRIEF OF DEFENDANT IN ERROR.

The counsel for the defendant in error attempt to sustain the judgment of the court below, both upon technicalities and upon the merits.

Technicalities: (1) It is urged that the allegations of the petition and the proof are insufficient to support a recovery, and that there is a variance between the allegations and the proof. (2) It is urged that the "Statuary Act Design" was published prior to the completion of the copyright.

Merits: (1) It is urged that Mr. Wallace is the author of the designs in suit, and entitled to the copyrights, and that the plaintiffs are not. (2) It is urged that the lithographs or chromos in suit are not the subjects of copyright.

The counsel conclude their discussion with five propositions differing somewhat in scope from the foregoing, but an examination of the argument itself will show that it is fairly covered by the foregoing analysis. We shall make our reply in the order indicated.

POINT I.

No objection was made to the petition in the court below, and it cannot be questioned now. The allegations, however, are amply sufficient.

This is an action at law and comes here merely for the correction of errors. The sufficiency of the petition was assumed and not questioned in the court below. No ruling upon it was demanded, and therefore no exception or assignment of error is presented by the record. Had the petition been attacked, it was open to amendment. In the absence of an objection, exception and assignment of error in the court below, this court must assume that the petition was ample to cover the questions there litigated, and "consider the facts as proved rather than as alleged."

Brady vs. Nally, 151 N. Y. 258.

See also:

Board of Com'rs vs. Sutliff, 97 Fed. Rep. 270.

Ry. Officials, etc., Ass'n vs. Wilson, 100 Fed. Rep. 368.

Frear vs. Sweet, 118 N. Y. 454.

The allegations of the petition were amply sufficient. The objections urged upon the attention of this court are that there is no averment that the lithographs are *colored* lithographs, or chromos; that they are pictorial illustrations; or that they are works connected with the fine arts or offered to the public as such. These objections are untenable.

The allegation of the petition is that the plaintiffs "designed and engraved a lithographic print, cut, or engraving, styled 'Spectacular Ballet Design' ['Stirk Family Design,'] ['Statuary Act Design'], for the purpose of vending the same." The petition also sets out the record of the title in the office of the Librarian of Congress and alleges the deposit therein of two copies together with descriptions; also that the plaintiffs have always claimed the exclusive right to make and sell the lithographs in suit.

These allegations fairly set forth all the essential facts. The allegation that the lithographs in suit were designed for the purpose of sale, and that the plaintiffs claim the exclusive right to make and sell them, fairly sets forth that they were intended and offered to the public upon their own merits, and for their own artistic value. The chromos in suit are lithographic prints or engravings.

In *Yuengling vs. Schile* (12 Fed. Rep. 97, 107), the court says:

"The chromo in question is nothing but a *lithographic print in colors*. * * * The only difference between chromo-lithographic prints and other lithographs is that the former are printed from several stones, namely, one for each color, while the latter are printed from one stone, with ink of some kind. It cannot be contended that a 'print' is any the less a 'print' because struck off in different colors. * * * As chromo-lithographs became largely dealt in, and, under the slang name of 'chromos,' became a considerable article of trade, it was not unnatural that for greater certainty they should be mentioned by name in the revision of the copyright act of 1870."

This case holds that aliens were not entitled to a copyright on chromos, under the statute then in force. It does not hold that chromos are subject to the restrictions of the statute applicable to "prints in general," as urged by the defendant's counsel.

The allegations of the petition clearly enabled the defendant to ascertain the precise character of the lithographs in suit. It was obliged to take notice of the official records in the office of the Librarian of Congress. The defendant might, however, have moved in the court below, upon a proper showing, to compel the plaintiffs either to make the petition more definite and certain, so as to set out whether or not the lithographs in suit were chromo-lithographs, or to furnish a bill of particulars. There was no occasion for such a motion. The petition was sufficiently specific.

POINT II.

The lithographs in suit are chromos.

The court will take judicial notice of what is a chromo. No allegation or proof is necessary. Copies of those in suit are in evidence and will be before the court. They are the best evidence of the facts. They are not printed in the record, for the reason that they could not easily be reproduced in colors upon the page prescribed for the printed record.

POINT III.

There is no variance between the pleading and proof.

It is a well-settled rule that facts may be pleaded according to their legal effect. The allegation of an act by a party admits of proof that the party did it through the instrumentality of another. *Qui facit per alium, facit per se.*

Bank of Metropolis vs. Guttschlick, 14 Peters, 19, 27; 10 L. Ed. 335, 339.

Poole vs. Hintrager, 60 Ia. 180; 14 N. W. Rep. 223.

Bennett vs. Judson, 21 N. Y. 238.

N. Y. News Publishing Co. vs. National Steamship Co., 148 N. Y. 39.

The counsel have laid altogether too much stress upon what they call the penal nature of this action. Since one-half of the recovery goes to the United States, and the amount of the recovery is not based upon actual damages, but upon the number of sheets found in the possession of the defendant, it may be regarded in these particulars as penal. The essence of the action, however, is remedial. The purpose of the statute is to provide a remedy for the plaintiffs, where proof of actual damage may be difficult or impossible.

See: *Blum vs. Widdicomb*, 90 Fed. Rep. 220.

The action is civil, not criminal. It is subject to the rules of pleading and evidence in civil rather than in criminal cases. It is even *ex contractu*, not *ex delicto* in form.

Johnston vs. Klopsch, 88 Fed. Rep. 692.

III Blackstone's Comm., 158, 160.

City of Gallatin vs. Tarwater, 44 S. W. Rep. 750 (Mo.).

In re Seagraves, 48 Pac. Rep. 272 (Okl.), and cases cited.

Roberge vs. Burnham, 124 Mass. 277.

Louisville & N. R. R. Co. vs. Hill, 22 So. Rep. 163, 169.

Moller vs. U. S., 57 Fed. Rep. 490.

Counsel cite *Rosenbach vs. Dreyfuss* (2 Fed. Rep. 217), and *Wilson vs. Singer Mfg. Co.* (9 N. Y. Weekly Dig. 338; Fed. Cases, No. 17836; aff'd. 12 Fed. Rep. 57). These were both cases arising upon demurrer. One was for the penalty prescribed for false notice of copyright; the other for false notice

of patent. In the one case the pleading showed that the copyright notice was affixed to a device not the subject of copyright; in the other case the pleading showed that the notice of patent was not false, but true. There is no analogy between them and the action at bar.

Counsel also cite *Marsh vs. Warren* (Fed. Cases, No. 9121), *Bennett vs. Carr* (96 Fed. Rep. 213) and *Bolles vs. Outing Co.* (175 U. S. 262), which we submit are not authorities in this case: the first was a motion for an injunction which was denied because the bill showed that the label had been published prior to copyright by registry in the Patent Office; the second was decided upon the point that the plaintiff had not perfected his copyright by the deposit of a description of the copyrighted painting; the last case simply held that the recovery of one dollar per sheet is limited to the number found in the possession of the defendant, and affirmed the direction of a verdict for that amount.

POINT IV.

The "Statuary Act Design" was not published prior to copyright.

The defendant's counsel entirely confuse the distinction between presumptions of law and presumptions of fact. In criminal as well as in civil actions presumptions of fact arise when facts are proved from which they are to be inferred.

Dunlop vs. United States, 165 U. S. 486; 41 L. Ed. 799.

The facts proved raised the undisputed inference that publication did not occur prior to April 15, 1898, the day the application and two copies were deposited in the mail properly addressed to the Librarian of Congress. (Printed Record, pages 39, 48, 51 and 53).

Authorities cited in original brief, pages 25-26.

POINT V.

Mr. Wallace was not the author of the lithographs or chromos in suit.

There was no understanding, express or implied, to the effect that Mr. Wallace should own the designs in suit. The proof

is direct and to the contrary. (Printed Record, page 34.) There is nothing whatever on which to base any serious claim that Wallace could have copyrighted these pictures.

The case of *Binns vs. Woodruff* (Fed. Cases, No. 1424; 4 Wash. C. Ct. 48), cited by defendant's counsel, was decided in 1821, under the act of 1790, as amended by the act of 1802, which provided for a copyright only to the author, and is not applicable under the present statute, which authorizes a copyright to the proprietor.

POINT VI.

The lithographs or chromos in suit are the subjects of copyright.

The counsel for defendant in error present two grounds for the exclusion of the plaintiffs from the benefit of their copyrights:

1. They charge, or rather insinuate, that the pictures are immoral.

2. They claim that the pictures are not works of the fine arts.

1. The pictures are not indecent or immoral in their tendencies, in any sense.

This suggestion of immorality seems too ridiculous to be seriously considered or answered. The argument of defendant's counsel does not make it clear whether they refer to all three of the designs or only to one,—the ballet design; but it is only the ballet which is subjected to any such criticism by the court below, and that rather as a suggestion than as a determination. The other two designs are plainly not open to such an imputation. To condemn any of the three would be to condemn at the same time a vast majority of the good people of this country, who can see nothing objectionable in them or in the scenes which they represent.

The ballet design is a scene taken from grand opera, where the ballet has been produced as a prominent feature for centuries, in all civilized countries. It can be no more improper or immoral at a circus than in an opera house.

Our friends on the other side and the court below may not like the ballet, and may think it immoral; but it is too late in the history of the world to condemn on this ground an institution which mankind in general support and uphold.

Even if there may be immoral things about the ballet, or about some ballets, it does not follow that a picture of an ordinary ballet group, in ordinary ballet costumes, such as this design represents, is immoral or indecent. Really this proposition seems too absurd to argue further.

The cases of *Martinetti vs. Maguire* (Fed. Cases No. 9173) and *Broder vs. Zeno Mauvais Music Co.* (88 Fed. Rep. 74) are cited in support of the suggestion that these pictures should be condemned as immoral. Neither of them is in point. The decision of the first of these cases is not based on the alleged immoral features of the exhibition known as the "Black Crook," partially quoted in the brief of the opposing counsel; but if the decision were based on such features, they have no possible application to the ballet scene from grand opera, the athletic exhibition, or the symbolic tableaux depicted by the pictures in suit.

In the second case the court determined that the words of a song were used in a lewd and lascivious sense. The case has no possible relation to the action at bar.

Respectable men and women indorse and enjoy the circus. It is both a useful and an educational institution, as well as a legitimate and proper place of amusement. The argument that the pictures in suit were calculated to "lure men to a circus," needs no further comment.

The defendant's counsel have injected into their brief the statement that the lithographs in suit have been suppressed by the police in certain localities. There is no proof to that effect, and we deny it absolutely.

2. It is submitted, both that the pictures in suit are works connected with the fine arts; and also that the act of June 18, 1874, relied upon by defendant's counsel, does not limit the subjects of copyright to works of the fine arts.

The term "fine arts" is sometimes limited to painting, sculpture, and architecture. But it also has a broader signification. It includes literature, the drama, music, lithography, engraving, etching, wood carving, engraving of gold and silver, decorating of china, and other articles—in fact every art which has primarily to do with the application of the imagination and taste to the production of something valuable for its artistic qualities. The lithographs or chromos in suit are clearly within the scope of the term. They were designed and sold by the plaintiffs for their artistic qualities, and it must have been on account of their merits that the defendant thought it worth while to pirate them. The plaintiffs have no circus or theatre to advertise; nor did the defendant plagiarize the designs for the purpose of advertising its own wares. The

pirate sheets were produced by the defendant for sale, upon their own merits.

The act of June 18, 1874, prescribes no penalty and is not to be construed most favorably to the defendant. It should be strictly construed so far as it limits, if at all, the meaning of the words "cut," "print," and "engraving," as used in the copyright statute in force; because Congress cannot be deemed to have intended to limit the common meaning of words except as specified. So far as the act is administrative in character, it is to be construed so as to accomplish its purpose.

The first section of the act provides that no person shall maintain an action for the infringement of his copyright unless he shall have given notice thereof, in either of two prescribed forms, upon some visible portion of his "print, cut, engraving," etc. One of these forms was already in vogue and prescribed by Sec. 4963 of the Revised Statutes; the other was new and much shorter.

The next section relates simply to fees. The third section is quoted in full in our original brief, page 8; but since the court below and the counsel for both parties all put a different construction upon it, the members of this court should examine the act as a whole. (18 St. at L. 78.)

The provision: "*In the construction of THIS ACT the words 'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts,*" can only apply, under anything like a strict construction, to the act itself, and not to § 4952 of the Revised Statutes, which authorizes the copyright of said articles. The effect of the limiting provision of the third section, under this construction of its scope, is to confine the use of the shorter form of notice to the articles mentioned in the first section, including chromos, and to such prints, cuts and engravings as are either pictorial illustrations or works connected with the fine arts; and to leave other prints, cuts and engravings subject to the longer form of notice prescribed by § 4962 of the Revised Statutes.

But as stated in our original brief, we are not compelled in this case to limit the words "*this act.*" in the third section of the act of 1874, to the act itself; because the lithographs in suit are at once chromos, pictorial illustrations, and works connected with the fine arts, in the broader sense of the term.

We add to the cases cited in our original brief, page 10, a very carefully considered decision of the Commissioner of Patents, holding, in substance, that a colored lithograph the shape of a pickle, containing the heads of three laughing children, designed for use as an advertisement of articles of

commerce, and possessing artistic merit, is the subject of copy-right by registry in the Patent Office.

Ex Parte H. J. Heinz Co., Official Gazette of the Patent Office, Vol. 62, page 1064.

The case of *Schumacher vs. Wogram* (35 Fed. Rep. 210) was merely an erroneous entry of copyright. The court determined that the picture was designed for use as a label and that it should have been copyrighted by registry in the Patent office, instead of being entered in the office of the Librarian of Congress.

The other cases cited by the defendant's counsel are collated and distinguished from the case at bar in our original brief.

We again call the attention of the court to the fact that the plaintiffs do not run a circus or theatre, and that the lithographs or chromos in suit were not designed by them for the purpose of advertising but for the purpose of sale. The allegation and proof is that they were designed solely for sale.

RECAPITULATION.

The court below discussed three distinct propositions without discriminating very clearly between them, or indicating upon which it based its judgment herein, namely: (1) that the Constitution did not authorize Congress to extend protection by copyright to the lithographs or chromos in suit; (2) that Congress, if it had the power, had not provided for their protection; and (3) that, if protection by copyright had been extended to chromos and lithographs in general, the lithographs or chromos in suit were not of sufficient merit to be entitled to protection. In our original brief we took up these points in the order indicated, and showed:

1. That the Constitution vests Congress with plenary power to protect, in its discretion, any useful art, and to determine the manner in which protection shall be secured.

2. That Congress, in the exercise of its undoubted power and discretion, has provided for the copyright of chromos, and also, at least such prints, cuts, and engravings as are either pictorial illustrations or works connected with the fine arts; but that labels and prints designed for articles of manufacture must be copyrighted by registry in the Patent Office instead of by entry in the office of the Librarian of Congress.

3. That the lithographs or chromos in suit are of intellectual and artistic merit, and designed by the plaintiffs for sale as

such; that the plaintiffs have complied with all the requirements of the law and are entitled to protection; that the defendant has violated their rights; and that the court below erred in the particulars set out in the assignment of errors in this case.

We submit the correctness of our contentions to the determination of the court, with confidence that it will reach the conclusion that the judgment of the court below should be reversed and the case remitted for a new trial, with proper instruction upon all the points argued in our original brief, several of which have not been touched upon by the counsel for the defendant in error, and are therefore practically conceded.

Dated May, 1900.

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